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THE PERMANENT COURT OF
INTERNATIONAL
JUSTICE

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THE PERMANENT COURT OF INTERNATIONAL JUSTICE

AND THE QUESTION
OF AMERICAN PARTICIPATION

WITH A COLLECTION OF DOCUMENTS

BY

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PREFACE

THE thirty years' struggle for the establishment of an adequate international court has at last come to fruition. The Permanent Court of International Justice now exists and its work is under way. The future developments cannot be accurately envisaged, but it would now seem improbable that the nations will abandon this agency for the orderly administration of international law, and the building of the future will doubtless be based on this beginning.

In the early stages of the movement for the establishment of such a tribunal, the United States took the leadership. But the final steps were taken without American assistance. Since the establishment of the Court, a contest has arisen in the United States with reference to American participation in maintaining it. The subject has now been discussed by the American public throughout two years. The opposition has been greatly weakened by President Coolidge's refusal to compromise with certain leaders in the Senate in May, 1924, and by the pronouncements in both the Democratic and Republican platforms in 1924 in favor of American participation. But the final step still remains to be taken, and the American Senate must still give its advice and consent. American opinion must therefore be currently informed of the Court's progress and its promise.

The papers in this volume have been published in various places during the past three years. They are now collected in the hope that some of them may contain useful information or suggestions, which will be more available in this form. Slight revision has been necessary in some instances, to avoid repetition, and some repetition may not have been avoided.

M. O. H.

HARVARD LAW SCHOOL
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THE PERMANENT COURT OF
INTERNATIONAL
JUSTICE

I

THE ESTABLISHMENT OF THE COURT¹

A WORLD tribunal for the adjudication of international disputes is at last a reality! On January 30, 1922, the eleven judges of the Permanent Court of International Justice are scheduled to meet at The Hague, and their assembling will crown with success a whole generation of determined effort.

The ideal of such a tribunal has been stirring in the minds and hearts of men for centuries. A Frenchman, Pierre Dubois, suggested it in 1305.² Another Frenchman, Emeric Crucé, in *Le Nouveau Cynée*, published in 1623, gave it definition and direction. And through a long succession of schemes for world-organization the aspiration gathered strength and support, until in the nineteenth century it became the definite goal of statesmen and found place in the policies of their governments.

STATUS OF OTHER COURT PROJECTS

The conspicuous successes in international arbitration in the latter half of the nineteenth century,³ more particularly the Geneva arbitration of 1872, made it possible for the Hague Conference of 1899 to establish the Permanent Court of Arbitration. Since its organization in 1900, this Court has proved a useful panel from which arbiters "of known com-

¹ Reprinted with slight revision from the *Harvard Law Review*, January, 1922, xxxv, 245-265.

² Dr. Vesnitch states that Article 23 of the Hague Convention for the Pacific Settlement of International Disputes follows the plan of Dubois almost textually. Vesnitch, *Deux Précurseurs Français du Pacifisme* (1911), p. 29. See also Vesnitch, "Cardinal Alberoni: An Italian Precursor of Pacifism and International Arbitration," *American Journal of International Law*, vii, 51.

³ Of one hundred and thirty-six arbitrations during the nineteenth century, as listed by Professor John Bassett Moore in the *Harv. Law Rev.*, xiv, 182-183, only nineteen occurred before 1850.

petence in international law" could be selected by disputant states desiring to submit their differences to arbitration. When the second Hague Conference met in 1907, four tribunals had been formed from the panel, and their experience was capitalized for modifying and strengthening the convention establishing the Court. But opinion had moved on in the interim between the two conferences, and delegates to the second Conference gave their chief interest to the proposals for establishing a Court of Arbitral Justice, to exist alongside the Permanent Court of Arbitration, as a tribunal for adjudication by permanent judges as differentiated from arbitration by judges selected *ad hoc*. The American delegates took a leading rôle in the efforts to establish the Court of Arbitral Justice, and it was only the inability of the delegates at the second Hague Conference to agree upon a scheme for selecting the judges which caused the failure. The Conference did recommend a plan for such a court,⁴ but later efforts to have the plan adopted proved likewise fruitless.⁵ Nor was the Hague Convention of 1907 for establishing an International Prize Court ever ratified by the signatory states, though resort to a system of rotation enabled an agreement to be reached on the method of selecting the judges of such a court.

When the five Central American republics met at a peace conference in Washington in 1907, they succeeded in setting up the Central American Court of Justice, which functioned with considerable success during the ten years of its existence and adjudicated no less than nine cases.⁶ But the work of

⁴ The plan was promulgated as an annex to the first *rau* of the 1907 Conference, the text of which is given in Scott, *Hague Conventions and Declarations of 1899 and 1907*, p. 31. See also *U. S. Foreign Relations*, 1907, pp. 1277 ff. A translation is reprinted in Appendix B, *post*, pp. 305-310.

⁵ On October 18, 1909, Secretary Knox proposed that the International Prize Court should also be utilized as the Court of Arbitral Justice. *U. S. Foreign Relations*, 1909, p. 597. See also *Amer. Jour. Int. Law*, Supp., iv, 102; Scott, *An International Court of Justice* (1916).

⁶ See the text of the convention establishing this court in *U. S. Foreign Relations*, 1907, pp. 697 ff. For the record of the court's activities, see *Anales de la Corte de Justicia Centro Americana*, vols. i-v. A list of the matters which came before this

this Court may be regarded as an experiment in federalism, in view of the history of the efforts to unite the Central American peoples into a single state.

ORGANIZATION OF THE NEW COURT

The outbreak of war in 1914 served to increase in some quarters the appreciation of the need for an international court which would exercise more authority than the Permanent Court of Arbitration. The appreciation grew, also, with the progress of the war,⁷ and when the Paris Peace Conference assembled in January, 1919, it was generally taken for granted that some attempt would be made to establish such a world court. But when the consideration of definite proposals for a league of nations was begun, the Italian delegates were the only ones to present any precise plan for an international court, and their suggestion followed very closely the Hague conventions.⁸ All drafts of the Covenant discussed in the Commission on the League of Nations contained a general provision recognizing the necessity for an international court but leaving its precise nature to future determination.⁹ The first published draft seemed to envisage the international court as an arbitration

court is contained in "The New Pan-Americanism," *World Peace Foundation* (pamphlet series), vii, p. xiii.

[A new convention was framed by the Conference on Central American Affairs, which met in Washington from December 4, 1922 to February 7, 1923, providing for the establishment of an International Central American Tribunal. See the *Report of the Conference*, pp. 296-313.]

⁷ See, for instance, *Reports of the New York State Bar Association*, 1915, p. 76; 1917, p. 104; 1918, p. 90.

⁸ The Italian suggestion is reprinted in a volume of *Documents Presented to the Committee of Jurists at The Hague in 1920*, p. 55. This is one of three volumes dealing with the Permanent Court of International Justice, published by the League of Nations Secretariat in 1921.

⁹ President Wilson's earlier drafts provided for arbitration, but did not expressly refer to an international court. See Senate Hearings on the Treaty of Peace with Germany, 66 Cong., 1 Sess., Document 106, pp. 256, 1167, 1172, 1216, and 1222. But the draft which he submitted to the League of Nations Commission on February 3, 1919, referred to it expressly. *Ibid.*, p. 1228. See also Ray Stannard Baker, *Woodrow Wilson and World Settlement*, iii, 67-163.

tribunal.¹⁰ But Article 14 of the final Covenant directed the Council of the League of Nations to formulate plans for a court which would be "competent to hear and determine any dispute of an international character which the parties thereto submit to it," and which might "give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly" of the League of Nations.

Soon after the Treaty of Versailles came into force, the Council of the League of Nations invited a committee of jurists to draw up plans for such a court.¹¹ When this Committee met at The Hague,¹² numerous suggestions were laid before it, some of which represented the results of the work begun by neutral European governments before the end of the war.¹³ After five weeks of deliberation,¹⁴ a draft scheme was prepared and presented to the Council as the

¹⁰ Article 14 of the draft published by the Preliminary Peace Conference on February 14, 1919, reads:

"The Executive Council shall formulate plans for the establishment of a Permanent Court of International Justice and this Court shall, when established, be competent to hear and determine any matter which the parties recognize as suitable for submission to it for arbitration under the foregoing article." — *Preliminary Peace Conference, Protocol No. 3, Annex A.*

For the final text of the Covenant, see *post*, p. 315.

¹¹ The Treaty of Versailles came into force as between certain of the signatories on January 10, 1920. The Council's first session in Paris, January 16, 1920, was largely formal. At the second session, in London, February 13, 1920, a brilliant report on the court was presented by M. Léon Bourgeois, who had been chairman of the third commission in the Hague Conference of 1899 and of the first commission in the Hague Conference of 1907. See *League of Nations Official Journal*, March, 1920, pp. 33-37.

¹² The Council's invitation was accepted by the following jurists: Adatei, Japan; Altamira, Spain; Descamps, Belgium; Fernandes, Brazil; Hagerup, Norway; de Lapradelle, France; Loder, Netherlands; Phillimore, Great Britain; Ricci-Busatti, Italy; Elihu Root, United States. Dr. James Brown Scott assisted at the meetings of the Committee, as legal adviser to Mr. Root.

¹³ The draft scheme framed by a conference of the representatives of Denmark, Netherlands, Norway, Sweden, and Switzerland was a notable contribution to the work of the Committee of Jurists. See *Documents Presented to the Committee of Jurists*, p. 301.

¹⁴ The Committee held thirty-five meetings, June 16-July 24, 1920. The *procès-verbaux* have now been published by the League of Nations Secretariat. The draft scheme of the Committee of Jurists was published in *Amer. Jour. Int. Law*, Supp., xiv, 371.

result of the Committee's labors. It was studied by the Council at two different sessions,¹⁵ and several modifications were introduced into a revised draft which the Council submitted to the Assembly of the League of Nations. In the Assembly, the Council's draft was referred to a committee on which all the members of the League—forty-two at that time—were represented. This committee entrusted a sub-committee of jurists¹⁶ with the preliminary study of the scheme, and after prolonged discussions a number of amendments were agreed upon in both the sub-committee and the committee.¹⁷ Thus amended, the plenary Assembly finally adopted the scheme with but one additional amendment.¹⁸

As it was unanimously approved by a resolution of the Assembly on December 13, 1920, the Statute of the Court was "adjoined" to the protocol of December 16, 1920,¹⁹ which was opened to be signed by the members of the League of Nations and the other states named in the annex to the Covenant. The Assembly's resolution provided that "as soon as this protocol has been ratified by the majority of the Members of the League, the Statute of the Court shall come into force." When the Second Assembly convened on September 5, 1921, the protocol had been signed by representatives of forty-two members of the League, and ratified by twenty-nine of them,²⁰ so that the existence of the Court

¹⁵ At the eighth session at San Sebastian, August 5, 1920, and at the tenth session at Brussels, October 27, 1920. See *League of Nations Off. Jour.*, September, 1920, p. 318; November–December, 1920, p. 12.

¹⁶ The sub-committee consisted of: Adatci, Japan; Doherty, Canada; Fernandes, Brazil; Fromageot, France; Hagerup, Norway; Hurst, British Empire; Huber, Switzerland; Loder, Netherlands; Politis, Greece; Ricci-Busatti, Italy.

¹⁷ The *procès-verbaux* of the ten meetings of the Committee, November 17–December 16, 1920, are published in *Records of the First Assembly*, Meetings of Committees, i, 275–329. The *procès-verbaux* of the eleven meetings of the sub-committee, November 24–December 10, 1920, are published in *Ibid.*, pp. 333–403.

¹⁸ For tracing the origin of the provisions of the final statute, and for comparing the drafts of the Committee of Jurists, the Council, and the Assembly, see the *Documents Published by the League of Nations Secretariat*, ii, 54–60, 214–221.

¹⁹ The text of the Assembly resolution is given in *Records of the First Assembly*, Plenary Meetings, p. 500; and the text of the protocol in *Ibid.*, p. 468.

²⁰ The following had ratified: Albania, Australia, Austria, Belgium, Brazil, British

was no longer conditioned by anything except the election of the judges.

SELECTION OF THE JUDGES

The Statute of the new Court provides for a membership of eleven judges and four deputy judges, elected "regardless of their nationality," possessing the "qualifications required in their respective countries for appointment to the highest judicial offices," or being "jurisconsults of recognized competence in international law." The difficulty of determining how they should be elected, which wrecked the attempts to establish the Court of Arbitral Justice at the second Hague Conference, was met by an ingenious suggestion made by Mr. Root to the Committee of Jurists at The Hague.²¹ Inspired by the success of the framers of the Constitution of the United States in dealing with the principle of equality of states, Mr. Root suggested that the Assembly and Council of the League might collaborate in the election of judges, who would thus become the choice of both large and small states. In accepting the suggestion, the committee proposed that the new Court should be linked with the Permanent Court of Arbitration by giving to the national groups in the latter the function of nominating the persons from among whom the judges should be chosen by the Assembly and Council acting independently.²² The world had made

Empire, Bulgaria, Canada, Czechoslovakia, Denmark, France, Greece, Haiti, India, Italy, Japan, Netherlands, Norway, New Zealand, Poland, Roumania, Serb-Croat-Slovene State, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela. This information is taken from the *League of Nations Off. Jour.*, October, 1921, p. 809. The ratifications of China, Cuba, and Portugal were later announced to the Second Assembly. *Journal of the Second Assembly*, pp. 93, 278, 303.

²¹ See the *Procès-verbaux of the Committee of Jurists*, p. 109.

²² A member of the League may participate in the election of judges though it has not signed or ratified the protocol establishing the Court.

The new states which have been set up since 1907 — Czechoslovakia and Poland — and which are not represented on the Permanent Court of Arbitration, will participate in the nomination of judges through "national groups appointed for this purpose . . . under the same conditions as those prescribed for members of the Permanent Court of Arbitration." [Poland adhered to the Hague Convention for the Pacific Settlement of Disputes on May 26, 1922, and Czechoslovakia on June 12, 1922. Finland also adhered on June 9, 1922. See *Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage*, 1923, p. 6.]

some progress since 1907, and the existence of the two political bodies of the League of Nations thus made it possible to advance the organization of judicial machinery.

But it still remained to be seen whether the elaborate scheme adopted for electing the judges would work in practice. The list of nominees as presented to the Second Assembly included the names of eighty-nine persons, of whom four formally declined to be considered as candidates for election. On September 14, 1921, the Assembly and Council proceeded to the election, with representatives of forty-two members of the League participating. The Assembly's list of eleven judges was completed in five ballots, and comparison with the Council's first list revealed that the two lists had nine names in common. A sixth ballot in the Assembly and a comparison of second lists resulted in the choice of two more judges. After three more ballots in the Assembly and a comparison of third lists, three of the deputy judges were chosen. The Assembly and Council then entrusted the selection of a fourth deputy judge to a joint conference committee, as provided by the Court Statute (Art. 12), whose choice was at once accepted by both bodies.²³ So that the first election, completed within three days, resulted in the selection of the following judges to serve for a term of nine years:²⁴ Altamira (Spain), Anzilotti (Italy), Barbosa (Brazil), de Bustamante (Cuba), Finlay (Great Britain), Huber (Switzerland), Loder (Netherlands), Moore (United States), Nyholm (Denmark), Oda (Japan), Weiss (France). The deputy judges selected are: Beichmann (Norway), Negulesco (Roumania), Wang Chung-Hui (China), Yovanovitch (Serb-Croat-Slovene State). All the persons elected accepted immediately, so that the constitution of the Court will be completed at its first meeting.

²³ This account of the election is based upon the *Journal of the Second Assembly*, pp. 84-107.

²⁴ This list is taken from the *League of Nations Off. Jour.*, October, 1921, Supp., p. 41.

RELATION OF THE COURT TO THE HAGUE TRIBUNALS

Like the Court of Arbitral Justice proposed at The Hague in 1907, the new Court is not intended to replace the Permanent Court of Arbitration. The Statute provides (Art. 1) that it "shall be in addition to the Court of Arbitration organized by the conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement." No attempt has been made to circumscribe the usefulness of the work of the Hague Conferences. The Permanent Court of Arbitration may still have some functions to perform, even though the new Court begins its work immediately. The national groups composing the former will serve as nominators of the judges of the new Court.²⁵ All of the states which ratified the Hague Conventions for the Pacific Settlement of International Disputes have not become members of the League of Nations and do not participate, therefore, in the election of the judges of the new Court. Some of them, moreover, have not been invited to sign the protocol establishing the Statute of the new Court;²⁶ and of those to which the protocol is open for signature, eight have not signed.²⁷ It is quite possible that such states will resort to the Permanent Court of Arbitration, rather

²⁵ But this in itself would hardly be a sufficient reason for continuing the Permanent Court of Arbitration, since the Statute of the new Court provides that states not represented on it may appoint national groups with the same qualifications to serve as nominators.

²⁶ Thus the Dominican Republic, Germany, Hungary as a part of Austria-Hungary, Mexico, Russia, and Turkey, which were signatories to the Hague Convention, are not members of the League and are not named in the Annex to the Covenant. [Hungary became a member of the League in 1922, and signed the protocol on August 1, 1923; the Dominican Republic became a member of the League in 1924 and signed the protocol on September 30, 1924.] Montenegro was also a party to the Hague Convention, but her independent existence now seems to have come to an end.

²⁷ Six members of the League had not signed the protocol on September 5, 1921 — Argentine, Chile, Guatemala, Honduras, Nicaragua, and Peru. [Chile signed the protocol on October 10, 1921.] Other states, signatories to the Hague Convention and invited to sign the protocol, which have not signed, are Ecuador and the United States of America.

than seek access to the new Court. And even the states which have ratified the protocol may in some instances desire to choose their own arbitrators from the Hague panel, rather than to employ the new Court with its fixed personnel; so that the continuation of the Permanent Court of Arbitration was not seriously questioned at any stage in the establishment of the new Court. As no conflict between the two is likely to arise, a great serviceability may still lie before the Permanent Court of Arbitration.

The differences are very marked between the old Hague Court of Arbitration and the new Court of Justice. Being only a panel, of course the members of the former never met as a body; the judges of the latter will come together at least once a year. The fact that governments may count upon a session of the new Court in June of every year, and upon the constant presence of the Court's president at The Hague, may have a great deal to do with their willingness to make use of it. Both the old and the new bodies are called "permanent." The Court of Arbitration is "permanent" in the sense that a panel is always in existence, from which arbitrators may at any time be chosen; the Court of Justice is "permanent" in the sense that eleven definite judges are always ready to sit, without any necessity of their being specially selected after a dispute arises. The difference means more than the saving of time—it may just tip the scales in favor of a willingness to appeal to orderly processes in preference to force. There is great advantage, also, in giving to picked individuals the opportunity and encouragement to grow in judicial experience and capacity. In the seventeen cases before tribunals formed from the Permanent Court of Arbitration,²⁸ there has been a decided tendency for the same persons to be chosen as arbitrators. For the seventeen arbitrations (three of which may be counted as a single arbitration) only twenty-

²⁸ As listed in the *Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage*, 1920, p. 37. [The *Rapport* for 1923, p. 40, lists an eighteenth arbitration, the Norway-United States arbitration of 1922.]

four persons were employed, out of a total panel of (about) one hundred and thirty-five; two arbitrators acted five times, one acted four times, and three acted three times.²⁹ In the new Court, the eleven judges or some of the four deputies will be sitting in every case. The possibility of building up a continuous and harmonious system of international law, therefore, seems more promising through the new Court than through the Permanent Court of Arbitration. The essential advantages of "permanence" have at last been achieved.

ARBITRATION AND ADJUDICATION

The new tribunal differs from the old panel, also, in that it professes to be a court of justice and not merely a court of arbitration. The distinction between the process of arbitration and that of adjudication has been greatly stressed during the period of propaganda for a new court. It proceeds on the notion that arbitration involves compromise, which seems to mean in some minds adding up the claims on both sides of a dispute and dividing the sum by two; while judicial settlement involves merely the application of definite and certain principles without any accommodation between the parties. The prevalent conceptions of arbitration may be the result, to some extent, of the meaning of the term in private law;³⁰ but the criticism of some of the awards of tribunals formed from the Permanent Court of Arbitration has also contributed to forming them. A remark of Dr. Lammasch that the North Atlantic Fisheries award "contained elements of a compromise" has been widely quoted, though it was later explained that it was not meant that the award itself was a compromise.³¹ The refusal of the arbitrators in the *Pious Fund Case* to recognize a doctrine of prescription in international law has been severely criticized as an instance where compromise prevailed.³² The

²⁹ See *Documents Presented to the Committee of Jurists at The Hague*, p. 35.

³⁰ Cf. Cohen, *Commercial Arbitration and the Law* (1918), pp. 10 *et seq.*

³¹ *Amer. Jour. Int. Law*, vi, 178.

³² Wehberg, *Problem of an International Court of Justice* (1918), p. 30.

award in the *Savarkar Case* has been similarly attacked.³³ But such criticism of the awards of the Hague tribunals is no more severe than the common criticism of domestic courts.³⁴ Decisions of the latter are frequently denounced as compromises. If compromise involves the splitting of differences, or the bargaining with extraneous matters, it is of course objectionable. In truth, neither international law nor municipal law is a "brooding omnipresence in the sky." Both have to be made. Neither is found full-blown. The process in both cases is one of balancing competing interests — more patently so when states are contending parties, as a result of the present condition of international law. Perhaps a sounder distinction could be drawn between arbitration or judicial settlement on the one hand and diplomatic negotiation on the other. There is no inherent quality of lawlessness in arbitration.³⁵ And whether an international tribunal be called a court of arbitration or a court of justice, it will probably travel along very much the same roads to reach its conclusions. Its task does not differ greatly from that of the United States Supreme Court in interpreting the Constitution.³⁶

The Hague Convention for the Pacific Settlement of International Disputes declared the object of international arbitration to be the settlement of disputes between states "by judges of their own choice and on the basis of respect for law."³⁷ The Statute of the new Court is more explicit. It provides (Art. 38) that the Court shall apply:

³³ By Dr. van Hamel in *Revue de Droit International* (2d ser.), xiii, 370, 376.

³⁴ Mr. William Cullen Dennis, in an able article on "Compromise—the Great Defect of Arbitration," *Columbia Law Review*, xi, 493, 501, found six of the Hague awards to be judicial decisions as against three "affected by the spirit of compromise." Mr. Jackson H. Ralston found that members of arbitral tribunals "have always treated international law as a rule of guidance." Ralston, *International Arbitral Law and Procedure* (1910), § 127.

³⁵ This is apparent in Justice Higgins's articles, "A New Province for Law and Order," *Harv. Law Rev.*, xxix, 13; xxxii, 189; xxxiv, 105.

³⁶ As described in Mr. Felix Frankfurter's article on "The Constitutional Opinions of Justice Holmes," *Ibid.*, xxix, 683. See also Charles Warren, *The Supreme Court and Sovereign States* (1924), pp. 53–68.

³⁷ Article 15 of the 1899 Convention; Article 37 of the 1907 Convention. Dr.

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This greater explicitness is to be welcomed, though it seems doubtful whether it will make the work of the new Court essentially different from that of the Hague tribunals. Some of the latter professed to follow "the principles of international law,"³⁸ and "the principles of international law and the maxims of justice."³⁹ But if the provision in the Hague Convention that disputes are to be settled "on the basis of respect for law" does not differ substantially from the direction to the new Court to apply "the general principles of law recognized by civilized nations," the Statute of the latter clearly distinguishes between decisions based on strictly legal grounds and decisions of a generally equitable nature. It provides (Art. 38) that the directions to the Court as quoted "shall not prejudice the power of the Court to decide a case *ex aequo et bono*,"⁴⁰ if the parties agree thereto."⁴¹ This relaxation must mean that with the consent of the parties the Court may consciously legislate *ad hoc* to settle

Wehberg's conclusion "that the words of the Hague Convention which speak of a decision 'on the basis of respect for law' must be regarded as a delusion," seems very extreme. See Wehberg, *The Problem of an International Court of Justice* (1918), p. 39.

³⁸ The Pious Fund Case, *Wilson's Hague Arbitration Cases*, p. 9.

³⁹ The Preferential Claims Case (Venezuela), *Ibid.*, p. 36.

⁴⁰ "The Roman conception involved in *aequum et bonum*, or *aequitas*, is identical with what we mean by 'reasonable,' or very nearly so." Pollock, *Expansion of the Common Law*, p. 111. Cf. Voight, *Jus Naturale, Aequum et Bonum und Jus Gentium der Römer* (1856); Ralston, *International Arbitral Law and Procedure* (1910), § 128.

⁴¹ This part of Article 38 was framed by the sub-commission of the third committee of the First Assembly, December 7, 1920. M. Politis (Greece) had proposed that the court should apply "the general principles of law and with the consent of the parties, the general principles of justice recognized by civilized nations." The *procès-verbal* states that "after some discussion, M. Fromageot (France) proposed to meet M. Politis's point by adding the provision in question." See *Records of the First Assembly, Meetings of Committees*, i, 403.

a particular case, may apply its general notions of equity and justice. But it furnishes little basis for saying that the new Court has been invested with extra-judicial functions.⁴²

WHAT LAW WILL THE NEW COURT APPLY

The body of conventional law which may be applied by the new Court has grown very rapidly since the end of the war. The peace treaties and their numerous supplementary agreements are in themselves very extensive. The creation of the new states and other changes wrought by the war have necessitated the revision of many of the pre-war treaties of a general nature, and with the establishment of the League of Nations and the annual meetings of the Assembly, it seems probable that more effort will be given to keeping the general treaties up to date. The output of the International Labor Conference and other technical organizations of the League promises to be very large.

The end of the war has been followed also by a revival of interest in the codification of international law. The preamble to the Covenant of the League of Nations envisages "the firm establishment of the understandings of international law as the actual rule of conduct among Governments," and it has increased the desire that these understandings be more clearly formulated. The Committee of Jurists which drafted the Court Statute expressed a *vœu* that a new interstate conference should be called, to carry on the work of the Hague Conferences of 1899 and 1907, in formulating and reestablishing and clarifying international law.⁴³ But the suggestion met considerable opposition. Lord Robert Cecil declared that we have not "arrived

⁴² Such a view may be strengthened by the peculiar wording of Articles 12, 13, and 15 of the Covenant, which, though they distinguish between arbitration and inquiry by the Council or Assembly of the League, fail to distinguish between arbitration before special tribunals and adjudication before the Permanent Court of International Justice. The Second Assembly has promulgated amendments which if ratified will clarify these articles of the Covenant. See *League of Nations Off. Jour.*, October, 1921, Spec. Supp., No. 6, pp. 13-14. [These amendments came into force on September 26, 1924. See *League of Nations, Document C. L. 136. 1924. V.*]

⁴³ *Procès-verbaux of the Committee of Jurists*, p. 747.

at sufficient calmness of the public mind to undertake that [codification] without very serious results to the future of international law," and this view prevailed in the first Assembly of the League of Nations.⁴⁴

Since the judges of the new Court are to write reasoned opinions, the decisions themselves should furnish in time a body of international law which the Court may apply. Perhaps this will prove to be the greatest advantage of having a permanent international judiciary, instead of arbitrators chosen *ad hoc*. The same persons sitting as judges in a number of cases must of necessity rely to some extent on their opinions as expressed in previous decisions. They will doubtless do so, even though they may deny that the Court's decisions are formally binding as precedents.⁴⁵ The framers of the Statute were careful to provide (Art. 59) that "the decision of the Court has no binding force except between the parties and in respect of that particular case."⁴⁶ This seems to involve more than a statement of the Anglo-American principle of *res judicata*. It seems to forbid the Court's adoption of the alleged practice of the British House of Lords, that previous decisions will not be overruled.⁴⁷ But it would not seem to preclude the Court's following the Anglo-American doctrine of *stare decisis*⁴⁸ and giving to its decisions the force as precedents which will weave them into a body of case law. The object of the framers of this clause was to obviate the necessity of a third state's intervening whenever its interests might be involved in a case.⁴⁹ *Res*

⁴⁴ *Records of First Assembly, Plenary Meetings*, p. 745.

⁴⁵ Though the French Code forbids judges "to decide a case by holding that it was governed by a previous decision," many jurists now admit that the provision fails to have that effect. Pound, *Spirit of the Common Law* (1921), p. 180.

⁴⁶ This provision originated with the Council though it had been implicit in the original draft of the Committee of Jurists. See *Documents*, ii, 50.

⁴⁷ *London Street Tramways Co. v. London County Council* [1898], Appeal Cases, p. 375.

⁴⁸ On *stare decisis* in international arbitration, see Ralston, *International Arbitral Law and Procedure* (1910), pp. iii, 74. [See also Judge de Bustamante's comment in 4 *Revista de Derecho Internacional*, p. 40.]

⁴⁹ See *Documents*, ii, 50.

judicata takes care of such cases; and the Statute itself provides (Arts. 62-63) for the intervention of a state which "has an interest of a legal nature which may be affected" by a decision, or which is a party to a convention which is being construed by the Court. But whatever the effect of the Statute with reference to *stare decisis* as a legal doctrine, the psychological fact of *stare decisis* — the tendency of the same men's minds to follow the same paths to the same conclusions — should ensure that the Court will make a great contribution to the international law of the future.

Another factor in determining whether the Court's decisions will gradually build up a new body of international law may be the nationality of its judges. In the tribunals formed from the Permanent Court of Arbitration, nationals of disputant states were named as arbitrators in eleven out of seventeen cases — ten out of twenty-nine arbitrators were such nationals. As the Convention for the Pacific Settlement of International Disputes provides (Art. 45) that only one of the two arbitrators named by a disputant state may be a national, it is practically impossible for more than two of the five members of a tribunal to be nationals of the parties. In the new Court (Art. 31), "judges of the nationality of each contesting party shall retain their right to sit in the case before the Court," and a litigant state whose nationality is not possessed by any of the judges may choose a special judge to sit on its case. This provision undoubtedly detracts from the formally impartial character of the Court. But as its decisions may be rendered by a majority vote, and as not more than two judges of thirteen (possibly nine) will usually be nationals of contesting states,⁵⁰ it seems improbable that the Court's decisions will lose any impartiality for this reason. Moreover, the judges are elected in

⁵⁰ If more than two states are parties, and if all have nationals among the judges, the proportion may be larger. Article 31 of the Statute is not clear on this point.

Secretary Lansing expressed the view to President Wilson at the Peace Conference in 1919 that "a tribunal on which representatives of the litigants sit as judges has not proved satisfactory." Lansing, *The Peace Negotiations* (1921), p. 127.

such a way as to be quite independent of their own governments. There is some advantage, too, in having on the Court nationals from states whose systems of law may be unfamiliar to some of the judges, when such states are parties before the Court.⁵¹ At any rate, the new Court is a great improvement on the Hague tribunals, which were likely to be more largely composed of nationals, and its decisions ought to contribute more effectively to the development of international law.

THE JURISDICTION OF THE NEW COURT

The Permanent Court of International Justice is to be quite strictly an interstate tribunal. It will be open only to states, and to other political units such as the British dominions which have achieved membership in the League of Nations. No suits by individuals will be entertained;⁵² recent efforts to make it possible for individual representatives of racial, religious, or linguistic minorities to hale an oppressing government before the Court have failed. Nor will the Court necessarily be open to all states. A state not a member of the League of Nations and not named in the annex to the Covenant, for example, the Dominican Republic, Germany, Hungary, Mexico, Russia, and Turkey, can have access to the Court as plaintiff only on the conditions which may be laid down by the Council of the League; but these conditions are not to be such as would "place the parties in a position of inequality before the Court" (Art. 35). [These conditions were formulated by the Council on May 17, 1922. *Vide post*, p. 364.] The limitation does not preclude the Court's being, in reality as well as in name, a world tribunal.

More difficulty was encountered by the framers of the

⁵¹ The electors are directed by the Statute (Art. 9) to bear in mind that the whole body of judges "should represent the main forms of civilization and the principal legal systems of the world."

⁵² The experience which led to the eleventh amendment to the Constitution of the United States may be thought to furnish some justification for this limitation.

Statute in determining the conditions on which the Court might exercise jurisdiction over defendant states. In the popular consideration of the plan in America, the question of so-called "compulsory jurisdiction" has been much discussed.⁵³ In the original draft, the Committee of Jurists suggested that the Court should have jurisdiction, as between members of the League of Nations, of all "cases of a legal nature, concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature and extent of reparation to be made for the breach of an international obligation; (e) the interpretation of a sentence passed by the Court." And the Committee proposed that it should be left to the Court itself to decide whether a certain case fell within these categories. Such a large competence would have constituted a very wide departure from the Hague system, or even from the court of arbitral justice proposed in 1907. Opposition to the proposals developed in many quarters, and the Council of the League seized upon the phraseology of Article 14 of the Covenant as necessitating their rejection.⁵⁴ The Assembly decided that the basis of the Court's jurisdiction should be an agreement between the parties submitting the dispute,⁵⁵ but it included in the final Statute (Art. 36) provision for an optional clause in the protocol, by signing which, states may declare that they "recognize as compulsory, *ipso facto* and without special agreement" a jurisdiction similar to that outlined by the Committee of Jurists. This declaration may be made "unconditionally or on condition of reciprocity," or

⁵³ See *Annals, American Academy of Political and Social Science*, for July, 1921, pp. 98-137.

⁵⁴ Article 14 of the Covenant provides that "the Court shall be competent to hear and determine any dispute of an international character *which the parties thereto submit to it*." The Council also relied on the doubtful use of the word "arbitration" in Articles 12, 13, and 15. See *Documents*, ii, 47.

⁵⁵ Professor de Lapradelle's report for the Committee of Jurists states: "There is an immutable law, in the evolution of legal institutions, which shows that an optional jurisdiction has always sooner or later been followed by a definite compulsory jurisdiction." *Procès-verbaux of the Committee of Jurists*, p. 694.

"for a certain time," and it need not be made at the time of signing the protocol. Such a declaration has been made by eighteen states, in most cases "on condition of reciprocity."⁵⁶

The Court may also have "compulsory jurisdiction" conferred upon it by treaty, or it may be utilized under existing treaties providing for compulsory arbitration, such as the Danish-Italian treaty of 1905.⁵⁷ In a number of recent treaties, provision has been made for the obligatory reference of disputes to the Court. Thus the peace treaties with Germany, Austria, Hungary, and Bulgaria confer on the new Court jurisdiction with reference to the ports, waterways, and railways clauses and the enforcement of international labor conventions, and the peace treaties with Austria, Hungary, and Bulgaria give it jurisdiction with reference to the protection of racial, religious, and linguistic minorities.⁵⁸ This jurisdiction is obligatory as to all the signatories of the peace treaties. The special treaties for the protection of minorities, concluded by the Principal Allied and Associated Powers with Czechoslovakia, Greece, the Serb-Croat-Slovene State, Poland, and Roumania, and by the Principal Allied Powers with Armenia, give the Court obligatory jurisdiction,⁵⁹ also, and may become the basis on which it will

⁵⁶ *League of Nations, Monthly Summary*, November, 1921, p. 159. The texts of some of the declarations are published in a memorandum by the Secretary-General. *League of Nations Off. Jour.*, October, 1921, pp. 808-809. [On December 1, 1924, the number of declarations was 23. See Appendix H, pp. 335-338.]

⁵⁷ *British and Foreign State Papers*, xcix, 1035.

⁵⁸ Treaty of Versailles, Arts. 336, 337, 386, 415-420, 423; Treaty of St. Germain, Arts. 69, 297, 298, 327, 360-365, 368; Treaty of Trianon, Arts. 60, 281, 282, 310, 343-348, 351; Treaty of Neuilly, Arts. 57, 225, 226, 277-282. Corresponding articles are included in the unratified Treaty of Sèvres, Arts. 346, 402-407, 416. Some of the articles dealing with ports, waterways, and railways refer to a "tribunal instituted by the League of Nations," which might not be the Permanent Court of International Justice. But the Court Statute provides (Art. 37) that "when a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal."

⁵⁹ The Polish Minority Treaty of June 28, 1919, which is the model on which the others were drafted, provides (Art. 12):

"Poland further agrees that any difference of opinion as to questions of law or fact arising out of these Articles between the Polish Government and any one of the Principal Allied and Associated Powers or any other Power, a Member of the Council of the League of Nations, shall be held to be a dispute of an international

build extensively. The Convention on Liquors in Africa (Art. 8), the Convention Revising the Berlin Act (Art. 12), and the Arms Traffic Convention of St. Germain (Art. 34), all dated September 10, 1919, refer to tribunals of arbitration which may be the Permanent Court of International Justice. The statute annexed to the Convention on Freedom of Transit (Art. 13) and the statute annexed to the Convention on Navigable Waterways (Art. 22), both of which were promulgated by the Barcelona Conference on Communications and Transit, confer obligatory jurisdiction on the Court. Altogether, the field in which the Court may function without the special *ad hoc* consent of the defendant state may be very large.⁶⁰

WHAT WILL THE NEW COURT HAVE TO DO

Speculation as to the amount of business which will come before the Court during its earlier years is, however, a very different matter. When the Central American Court of Justice was inaugurated, the United States Commissioner stated that "an entire absence of business for the Court would be the highest justification for its creation."⁶¹ In the present state of the world, perhaps few persons would take the same view of this new Court. Yet it may be months, or even years, before any contested cases are brought before it. When the United States Supreme Court first met in February, 1790, it had no business to transact except the reading of the five justices' commissions and the promulgation of four simple rules of procedure; it met again in August, 1790, and again in February, 1791, without business of any kind.

character under Article 14 of the Covenant of the League of Nations. The Polish Government hereby consents that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice. The decision of the Permanent Court shall be final and shall have the same force and effect as an award under Article 13 of the Covenant."

⁶⁰ [The various agreements giving the Court such jurisdiction are noted in the Publications of the Permanent Court of International Justice, Series D, No. 4.]

⁶¹ William I. Buchanan, in *United States Foreign Relations* (1908), p. 247.

In August, 1791, and February, 1792, three motions were heard and one was granted. Not until August, 1792, did it have a contested case; and the first important case, *Chisholm v. Georgia*, did not arise until February, 1793.⁶² So, also, the Permanent Court of Arbitration, organized in 1900, was not utilized until the *Pious Fund Case* between the United States and Mexico was referred to it in 1902. Similarly, the new Permanent Court of International Justice may not be presented with a crowded docket for some time to come.

But it may at any time be called upon to give an advisory opinion to the Assembly or Council of the League. So many questions are arising before these bodies that some such activity for the Court seems quite probable. If the Court had been in existence, it would undoubtedly have been used in the dispute between Finland and Sweden concerning the Aaland Islands. Finland maintained that the dispute arose out of a matter which by international law was solely within her domestic jurisdiction. The Council found it necessary to set up a special commission of jurists to deal with the question, declaring that it "would have been placed . . . before the Permanent Court of International Justice for its advisory opinion, had that body already been established."⁶³ In June, 1921, when the Council was asked to pass upon the competence of the courts of the Free City of Danzig in the case of *Puffel v. Deutsche Bauern Bank*,⁶⁴ the assistance of the Court might have been sought, also. And the Second Assembly might have asked for the opinion of the Court on the question of the Assembly's competence to revise the Peace Treaty of 1904 between Bolivia and Chile, instead of referring the question to a special jurists' committee.⁶⁵ These three cases indicate a possible usefulness for

⁶² The record of the early terms of the United States Supreme Court is in 2 Dallas (U. S.), pp. 399 ff.

⁶³ *League of Nations Off. Jour.*, July-August, 1920, p. 249.

⁶⁴ *Ibid.*, September, 1921, p. 669.

⁶⁵ *Journal of the Second Assembly*, September 27, 1921, p. 218.

the Court in the task of completing the organization of the League, as well as in the functioning of its political bodies.

Though numerous legal questions are continually arising in connection with the execution of the treaties of peace, the signatories have shown a disposition to effect practical arrangements which obviate the necessity for court interpretation and adjudication. But it will doubtless become more difficult to effect such arrangements as the control of the Allied Powers diminishes, and as time goes on the aid of the Court may be sought in the construction of the voluminous treaties. In its first meeting, the work of the Court may be confined, however, to the election of a president and a registrar; to the preparation of a list determining the order in which the deputy judges will be called upon; to the appointment of special "chambers" or divisions for summary procedure, for labor questions, and for questions relating to transit and communications; and to the promulgation of rules of procedure.

PROCEDURE IN THE NEW COURT

When a case comes before the Court, at least nine judges must sit, and there usually will be eleven or more. The French and English languages will be used, and the Court may at the request of the parties authorize the use of some other language.⁶⁶ The procedure, so far as it is prescribed by the Statute, follows in broad outline the procedure before the Hague tribunals. It will consist of written "cases, and counter-cases, and if necessary replies";⁶⁷ and an oral hearing of witnesses, experts, agents, counsel, and advocates.⁶⁸

⁶⁶ On the use of languages in the Hague tribunals, see Dennis, "The Orinoco Steamship Company Case," *Amer. Jour. Int. Law*, v, 35, 59. Cf. also Ralston, *International Arbitral Law and Procedure*, § 280.

The French and English texts of the Court protocol are both authentic; this provision in the protocol presumably applies also to the French and English texts of the Statute.

⁶⁷ On the meaning of similar provisions in the Hague Convention, see Dennis, "The Necessity for an International Code of Arbitral Procedure," *Amer. Jour. Int. Law*, vii, 285, 290; Ralston, *International Arbitral Law and Procedure*, § 273.

⁶⁸ The provision for hearing witnesses was not explicit in the Hague Convention.

Service of notice on individuals in any country may be effected through the government of that country. The hearing will be opened to the public unless the Court decides, or the parties demand, that it be private.⁶⁹ In line with current conceptions of court procedure in England and America,⁷⁰ it is left to the Court itself to promulgate its rules of pleading, practice, and evidence. It is a great advantage that these rules may be laid down and known in advance; the *ad hoc* procedure before the Hague tribunals had to be established either in the *compromis* or after the reference of the case, with the frequent result pointed out by Mr. Dennis that "when the parties actually face one another across the counsel-table at The Hague, everything is chaotic so far as procedure is concerned."⁷¹ The Court has power to order a discovery. It may avail itself of the assistance of experts. It may conduct an inquiry through agents of its own selection; when it is considering questions concerning labor or transit and communications, "assessors" will sit with the judges, but without power to vote. The decisions of the Court will be taken by a majority of the judges sitting, and a judge who dissents from a judgment in whole or in part may deliver a separate opinion. Pending a final decision, the Court may indicate "provisional measures which ought to be taken to reserve"⁷² the respective rights of either

⁶⁹ See John H. Wigmore, "Shall the World Court be open to the Public?" *Amer. Bar Assn. Jour.*, July, 1924, p. 471; Manley O. Hudson, "Is the World Court open to the Public?" *Ibid.*, October, 1924, p. 711.

⁷⁰ See Hudson, "The Proposed Control of Procedure by Rules of Court in Missouri," *Law Series, Missouri Bulletin*, xiii, 5.

⁷¹ Dennis, "The Necessity for an International Code of Arbitral Procedure," *Amer. Jour. Int. Law*, vii, 285, 292.

⁷² This word was "preserve" in the original draft of the Committee of Jurists—see the *Procès-verbaux*, p. 681; and in the sub-committee's report to the third committee of the First Assembly—see *Records of the First Assembly*, Meetings of Committees, i, 545. Nor was a change in wording discussed when the article was adopted by the third committee. *Ibid.*, p. 307. So that the change in the third committee's report to the First Assembly may have originated in a typographical slip. *Ibid.*, p. 576. This conclusion is fortified by the fact that the word was "preserve" in the Bryan treaties, from which the provision is taken. See the Treaty between the United States and Sweden of October 13, 1914, 38 *Statutes at Large*, 1872; *Records of the First Assembly*, Meetings of Committees, i, 368; *Procès-verbaux of the Committee*

party" (Art. 41), though this would seem to stop short of power to issue an *interim* injunction.⁷³ The provision for default judgments against states which fail to appear or defend, will hardly be invoked except in the instances of obligatory jurisdiction.⁷⁴

The Statute fails to make any provision for the enforcement of either *interim* or final judgments, and the only "sanctions" behind the Court are those contained in the Covenant;⁷⁵ and if any state should fail to abide by a decision, it will be for the Council of the League to "propose what steps should be taken to give effect thereto." Like the Supreme Court of the United States, the Permanent Court of International Justice may depend for its authority in the last analysis upon the political bodies with which it is affiliated.

INTERNATIONAL JUSTICE ACCORDING TO LAW

The task of creating machinery for dealing with disputes with which the world has been so occupied now for a generation seems to have been performed, for the time being. The existing machinery now seems fairly adequate. For disputes of a juridical nature, we have, in addition to the special arbitral tribunals which states may set up as occasion arises, the Permanent Court of Arbitration, with its achievement of successful functioning in seventeen instances, and the Permanent Court of International Justice, with its per-

of *Jurists*, p. 735. The French text of the Statute reads: "*mesures conservatoires du droit de chacun doivent être prises à titre provisoire.*"

⁷³ Interlocutory decrees were issued by the Central American Court of Justice. See *Amer. Jour. Int. Law*, ii, 838.

⁷⁴ Cf. *Massachusetts v. Rhode Island* (1838), 12 Peters (U. S.), 755.

⁷⁵ It has been generally admitted that a decision of the Court is an "award" which the members of the League agree in Article 13 of the Covenant to "carry out in full good faith." See *Records of the Assembly*, Plenary Meetings, p. 491. The Minority treaties expressly provide that the decisions of the Court "shall have the same force and effect as an award under Article 13 of the Covenant." See Treaty of St. Germain, Article 69. The Second Assembly has promulgated an amendment to the Covenant which, if adopted, will leave no doubt on this point. See *League of Nations Off. Jour.*, October, 1921, Supp., p. 13. [The amendment came into effect on September 26, 1924.]

manent, professional judges, paid adequate salaries,⁷⁶ ready to devote "their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility."⁷⁷ For disputes of a political nature, fifty-one peoples have agreed to have resort to the Council or Assembly of the League of Nations before going to war.⁷⁸ Machinery itself is important. If there is such a thing in political science as a useful invention — the establishment of the United States Supreme Court and the rôle played by Lord Durham's report in the development of the British Empire encourage the belief that political science is not unlike physical science in this respect — the builders of the new Court would seem to have made a valuable contribution to the integration of international society.

But machinery and the intelligent use of it will not insure the world against departures from justice according to law. The will for peaceful adjustment is needed, and its creation depends upon the deeper mainsprings of national life.

⁷⁶ Salaries and other court expenses are to be borne by the League of Nations. Costs of litigation are to be borne by the parties.

⁷⁷ See Secretary Root's Instructions to the American Delegates to the Hague Conference of 1907, Scott, *Hague Conferences*, ii, 191.

⁷⁸ The Treaty of Washington of December 13, 1921, contains an additional provision for conferences to consider disputes as to the Pacific insular possessions of the signatories. U. S. Treaties, Conventions, etc., iii, 3094.

II

THE FIRST YEAR OF THE COURT¹

THE efforts made at the Hague Conference of 1907 to establish a permanent court of arbitral justice in addition to the panel which we call the Permanent Court of Arbitration, bore fruit at the Paris Peace Conference in 1919 in Article 14 of the Covenant of the League of Nations. The task of establishing a new court was too delicate for the Peace Conference to undertake. So the Covenant stopped short with directing the Council of the League of Nations to formulate plans for a permanent court of international justice, and submit them to the members of the League "for adoption." The Council lost no time after its organization in discharging this responsibility. At its second session, in February, 1920, which was really its first session for the transaction of business, it set up a Committee of Jurists to draft a scheme.² This Committee deliberated through the summer of 1920, and its draft project was submitted to the Council at San Sebastian in August.³ In November, 1920, the Council submitted the project, with amendments, to the First Assembly of the League, and on December 13, 1920, the Assembly unanimously adopted a resolution approving the project with some further amendments.⁴ As the Statute of the Permanent Court of Inter-

¹ Reprinted with slight revision from the *Amer. Jour. Int. Law*, January, 1923, xvii, 15-28.

² *League of Nations Off. Jour.*, March, 1920, p. 33.

³ *Ibid.*, September, 1920, p. 318. See Dr. James Brown Scott's "Commentary on the Project," published in 1920 as No. 35, Pamphlet Series of the Carnegie Endowment for International Peace, Division of International Law.

⁴ *Records of First Assembly*, Plenary Meetings, p. 500. The protocol was approved by the Council on December 14, 1920. For the French and English texts of the Statute as finally adopted, see *League of Nations Treaty Series*, vi, 390. For the French and English texts of the Statute as originally drafted, the modifications of the Council and Assembly of the League of Nations, and the final text, see *Proceedings of the American Society of International Law* (1920), pp. 43-78. For an

national Justice, it was then adjoined to a "protocol of signature" executed on December 16, 1920. This protocol was opened "for signature by the members of the League of Nations and by the states mentioned in the Annex to the Covenant of the League," and it has now (December 1, 1922) been signed by forty-six members of the League, of which thirty-five have ratified.⁵

In accordance with a provision in the Assembly resolution, referred to in the protocol itself, the Statute came into force in September, 1921, on the ratification of the protocol by a majority of the members of the League.⁶ This made it possible for the judges and deputy judges to be elected by the Second Assembly then in session at Geneva, and the election was finished on September 16, 1921.⁷ All of the judges elected accepted within one week,⁸ and on December 1, the Secretary-General of the League summoned the judges to meet at The Hague on January 30, 1922.

THE COURT'S FIRST SESSION

The first session of the Court lasted from January 30 to March 24, 1922. The formal opening was held in the Great Hall of Justice in the Peace Palace, on February 15, 1922, with addresses by M. Da Cunha, representing the Council of the League, Sir Eric Drummond, Secretary-General of the

Italian text, see *Rivista di Diritto Internazionale*, xiii, 478. For a German text, see Schücking and Wehberg, *Die Satzung des Völkerbundes*, pp. 331-341.

⁵ The *League of Nations Off. Jour.* for September, 1922, p. 1025, lists thirty-four ratifications of the protocol and thirteen ratifications of the optional clause as to compulsory jurisdiction. See also *League of Nations Treaty Series*, vi, 411. On September 20, 1922, the Secretary-General notified the members of the League of the thirty-fifth ratification of the protocol and the fourteenth ratification of the optional clause by Esthonia. [See Appendix G, p. 334, *post*, for an up-to-date list of signatures and ratifications.]

⁶ It seems that no formal declaration was ever made of the precise date on which the twenty-fifth ratification (the League then had forty-eight members) was effected. But on September 8, 1921, the Secretary-General reported to the Second Assembly that twenty-eight states had ratified. *Records of the Second Assembly*, Plenary Meetings, p. 161.

⁷ An account of the first election, by Dr. James Brown Scott, was published in *Amer. Jour. Int. Law*, xv, 556. See also 39 *South African Law Journal*, p. 14.

⁸ *Records of Second Assembly*, Plenary Meetings, p. 293.

League, M. van Karnebeek, Minister for Foreign Affairs of the Netherlands, Dr. Patijn, Burgomaster of The Hague, and Judge Loder, President of the Court.⁹ All of the judges were present except Judge Barbosa and Judge de Bustamante, whose places were taken by Deputy Judges Yovanovitch and Beichmann. After it assembled, the Court invited the other two deputy judges to be present, and Deputy Judge Negulesco accepted this invitation, but Deputy Judge Wang was then engaged at the Washington Conference and had to decline. The chief items on the agenda for this first session were the election of officers and the promulgation of rules of procedure, though many other formal questions had to be disposed of in connection with the organization of the Court.¹⁰ Judge Loder of Holland was elected President of the Court, and Judge Weiss, Vice-President. For the important administrative post of Registrar, the Court appointed Mr. Åke Hammarskjöld, who, as a member of the Secretariat of the League of Nations, had rendered invaluable service both in connection with the work of the Committee of Jurists in 1920 and in connection with the election of the judges by the Second Assembly. The special chambers provided for by the Statute of the Court (Arts. 26, 27, and 29) were constituted as follows: the Chamber of Summary Procedure, Judges Loder, Weiss, and Huber; the Chamber for Labor Cases, Lord Finlay, Judges de Bustamante, Altamira, Anzilotti and Huber; and the Chamber for Transit and Communications Cases, Judges Weiss, Barbosa, Nyholm, Moore, and Oda.

The most important task at the first session was the drafting of rules of procedure. Fortunately, no attempt was made in the Statute itself to harness the Court with detailed

⁹ *League of Nations Off. Jour.*, April, 1922, p. 306.

¹⁰ See John Bassett Moore, "The Organization of the Permanent Court of International Justice," *Columbia Law Review*, xxii, 497. Of the numerous questions of a formal nature which came before the Court, some were handled in consultation with the Council of the League. On the rank and title of the judges, for instance, see *League of Nations Off. Jour.*, June, 1922, p. 568; on the financial administration of the Court, see *Ibid.*, p. 564.

procedural limitations, and in this respect its position is like that of the Supreme Court of the United States, which has enjoyed some rule-making authority since its establishment.¹¹ It is provided in the Statute (Art. 30) that "the Court shall frame rules regulating its procedure. In particular, it shall lay down rules for summary procedure." Three drafts of a *règlement* were laid before the Court, and were carefully studied, first by a committee of five judges and later by the plenary bench. It was decided that no attempt should be made to draft a complete code, but that the *règlement* should supplement the provisions in the Statute, dealing with questions of organization left open by the Statute as well as with questions of procedure.¹² As it was adopted on March 24, 1922, the *règlement* contains seventy-five articles: a first chapter of thirty-one articles dealing with the constitution and working of the Court, and a second chapter of forty-four articles dealing with procedure.¹³ The procedure adopted makes no wide departures, in its general outline, from the procedure before the tribunals of the Permanent Court of Arbitration.¹⁴ Both contentious and advisory procedure are provided for, the latter being necessary in connection with the Court's function of giving advisory opinions when requested by the Council or the Assembly of the League.¹⁵

¹¹ See the address of Chief Justice Taft before the American Bar Association, August 10, 1922, reprinted in *American Bar Association Journal*, October, 1922, p. 601. On the regulation of procedure by Rules of Court in the United States, see the author's article in *Law Series, Missouri Bulletin*, xiii, 3.

¹² See Mr. Hammarskjöld's valuable and authoritative study of the *règlement*, in *Revue de Droit International et de Législation Comparée* (3d ser.), iii, 125. [See also, Hammarskjöld, "The Early Work of the Permanent Court of International Justice," *Harv. Law Rev.*, xxxvi, 705-725.]

¹³ The Rules of Court have been reprinted in *Amer. Jour. Int. Law Supp.*, xvi, 173; *Columbia Law Review*, xxii, 518; *Revue de Droit International et de Législation Comparée* (3d ser.), iii, 245; *Rivista di Diritto Internazionale*, xiv, 233. See also the volume entitled *The Permanent Court of International Justice, Statute and Rules*, published by the International Intermediary Institute at The Hague, in 1922; and Niemeyer's *Zeitschrift für Internationales Recht*, xxx, 200.

¹⁴ Compare, for instance, Articles 39 and 40 of the Rules of Court with Article 63 of the Convention on the Pacific Settlement of International Disputes of 1907.

¹⁵ Judge Moore has described this giving of advisory opinions as "obviously not

THE COURT OPEN TO ALL STATES

The Council and Assembly recognized from the beginning that the Court ought to be open to states not members of the League. The Committee of Jurists had provided in its draft that the Court should be open to all states named in the Annex to the Covenant as "of right," and also to other states, and had left it to the Council to determine the conditions on which states not members of the League should have access to it. This provision was amended slightly in the Assembly, and the final Statute (Art. 35) leaves the Court open to members of the League and to states mentioned in the Annex to the Covenant, with the addition that "the conditions under which the Court shall be open to other States shall . . . be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court." It was this feature which led Dr. David Jayne Hill to "observe" that "it is not a universal Court but the private court of the League."¹⁶ Yet the Court has always been open to all states named in the Annex to the Covenant, of which Ecuador, the United States, and the Hedjaz are not members of the League.

The judges of the Court seem to have been alive to this question from the start. On February 21, 1922, the President of the Court requested the Council to inform the Court how it proposed to exercise its powers in this respect, whether by general rules applicable to all cases, or by special provision for particular cases as they should arise. The Council considered the matter at its eighteenth session in Geneva on May 12, 1922, and adopted a resolution opening the Court to a state which is not a member of the League of

a judicial function"; *Columbia Law Review*, xxii, 507. But it is not strange to American lawyers to have this function in the hands of a court. The Supreme Judicial Court of Massachusetts has had the duty of giving advisory opinions to the executive and legislative departments of the government since 1780. See Thayer, *Legal Essays*, p. 42. On the weight to be given to advisory opinions, see *Perkins v. Westwood* (1917), 226 Mass., 268, 271. [See *post*, Chap. v.]

¹⁶ *Amer. Jour. Int. Law*, xvi, 60. Cf. Rougier, "L'Organisation de la Cour Permanente de Justice Internationale," *Revue Politique et Parlementaire*, cviii, 177, 188.

Nations or mentioned in the Annex to the Covenant, on condition "that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court" and shall undertake "to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith."¹⁷ It is provided, also, that such a declaration may be particular or general, and that any question as to the validity of a declaration shall be decided by the Court itself. The effect of the action taken by the Council is to remove all possible grounds for contending that the Court is not a world court, open to all states on terms of equality.

THREE ADVISORY OPINIONS

At its first session, no matters had been submitted to the Court for its opinion or decision. But when the second session (generally spoken of as the first regular session) was begun on June 15, 1922, two requests for advisory opinions were before the Court, and before the session was ended a third request came from the Council of the League of Nations. All three questions related to the activities of the International Labor Organization created by Part XIII of the Treaty of Versailles and corresponding parts of the other treaties of peace negotiated at Paris.

Nomination of Delegates to the International Labor Conference

At the third session of the International Labor Conference, held at Geneva from October 25 to November 18, 1921, a protest was made against the acceptance by the Conference of the credentials of the Workers' Delegate named by the

¹⁷ *League of Nations Off. Jour.*, June, 1922, pp. 526, 545-546, 609. The Minutes of the Council meeting of May 12, 1922, contain a statement that "it was agreed that the revised text of the resolution should be submitted to the Council at a later meeting." This may have been for the purpose of enabling the Court itself to express an opinion on the resolution. Further consideration was given to the matter on May 17, 1922, and the resolution was then adopted in final form. [See *post*, p. 364.]

Netherlands government. At the first session of the Conference in Washington, in 1919, and at the second session in Genoa in 1920, the Workers' Delegate of the Netherlands had been nominated in agreement with the Netherlands Confederation of Trade Unions. But the Workers' Delegate at the third session in 1921 was nominated in agreement with the Confederation of Catholic Trades Unions, the Confederation of Christian Trades Unions, and the Netherlands General Confederation of Trades Unions, but not in agreement with the Netherlands Confederation of Trades Unions. The last named had a membership of 218,596; the three others had a total membership of 282,455, though no one had a membership of more than 155,642. The Netherlands Confederation of Trades Unions protested against the nomination, by a letter sent to the International Labor Office on October 22, 1921, on the ground that the nomination constituted a violation of the provision in Article 389 of the Treaty of Versailles, that the delegates be "chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries." The protest was considered by the International Labor Conference, which is expressly authorized by the Treaty of Versailles (Art. 389) to scrutinize the credentials of delegates and to refuse to admit any delegate not properly nominated. It was decided to admit the delegate nominated by the Netherlands government, in spite of the protest, but the Conference then adopted a resolution asking the Governing Body of the International Labor Office to request the Council of the League of Nations to obtain from the Court an opinion as to the interpretation of Article 389, and as to the rules which should be observed in the appointment of non-government delegates to the International Labor Conference. On March 17, 1922, the Director of the International Labor Office informed the Council of the decision of the Governing Body to ask the Council to request

the Court for an opinion. On May 12, 1922, the Council adopted a resolution requesting the Court to give an advisory opinion on the question:¹⁸ "Was the Workers' Delegate for the Netherlands at the Third Session of the International Labor Conference nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles?"¹⁹ By a letter dated May 22, 1922, the Court was informed of this request by the Secretary-General of the League. In compliance with Article 73 of the Court *règlement*, notice of the request was at once given to all members of the League, to other states named in the Annex to the Covenant, and it was communicated to Germany and Hungary, Germany being a member of the International Labor Organization. An interesting precedent was set, also, in sending notice to the International Association for the Legal Protection of Workers, the International Federation of Christian Trades Unions, and the International Federation of Trades Unions.

The Court was thus seised of the question when it met on June 15, 1922. It decided to hear in public the representatives of any government and of any international organization which desired to be heard. It heard oral statements on behalf of the British and Netherlands governments, and the International Federation of Trades Unions, the International Federation of Christian Trades Unions, and the International Labor Office.²⁰ It also received documents from the International Labor Office, the Netherlands government, and the Netherlands General Confederation of Trades Unions. On July 31, 1922, the Court gave the unanimous opinion²¹ that the Netherlands nomination had

¹⁸ *League of Nations Off. Jour.*, June, 1922, pp. 528, 610.

¹⁹ This formulation of the question was criticized by the Netherlands government, in a communication dated June 7, 1922.

²⁰ The proceedings of the Court of June 22, 24, 26, 29, and 30 have been reprinted in the International Labor Office *Official Bulletin*, July 19, 1922, pp. 33-92. See also *Journal du Droit International* (Clunet), xlix, 460.

²¹ *Publications of Permanent Court of International Justice*, Series B, No. 1. The text is reproduced in the International Labor Office *Official Bulletin*, August 16, 1922, p. 291.

complied with Article 389 of the Treaty of Versailles. The main ground of the opinion was that, in a country where there are several organizations of workers, all of these organizations should be taken into consideration in the nomination of a Workers' Delegate, and not merely that one which has the largest membership, even if the one may be the "most representative." An issue which has been recurring since the first session of the International Labor Conference²² is thus put at rest. The Court's opinion was duly communicated to the Council, and by the Council to the Director of the International Labor Office.

*Agricultural Labor and the International Labor
Organization*

At the sixteenth session of the Council, on January 13, 1922, the representative of France asked the Council to request the Court to give its opinion whether the International Labor Organization has competence to deal with questions as to agricultural labor.²³ At the first session of the International Labor Conference in Washington, in 1919, it had been decided to place on the agenda of a future session the subject of agricultural labor.²⁴ In pursuance of this action, the agenda of the third session included three items relating to agricultural labor. Shortly before the opening of the session, the French government raised the question of competence. On October 27, 1921, the Conference, by a vote of 74 to 20, declared itself to be competent, and it later adopted several measures, draft conventions and recommendations, dealing with the protection of agricultural workers. Thus the matter stood when, without raising the question in the Governing Body of the International Labor Office, the French government presented its request to the Council. No action was taken by the Council in January; but on

²² See *Minutes of First International Labor Conference*, 1919, pp. 206-207.

²³ *League of Nations Off. Jour.*, February, 1922, p. 106.

²⁴ *Minutes of First International Labor Conference*, 1919, p. 199.

May 12, 1922, the Council voted to request the Court for an advisory opinion on the question: "Does the competence of the International Labor Organization extend to the international regulation of the conditions of labor of persons employed in agriculture?"²⁵ On May 22, 1922, the request was transmitted to the Court by the Secretary-General. Notice of the request was given to all members of the League, to other states named in the Annex to the Covenant, and communicated to Germany and Hungary. The following organizations were notified also: the International Federation of Agricultural Trades Unions, the International League of Agricultural Associations, the International Agricultural Commission, the International Federation of Christian Unions of Land Workers, the International Federation of Land Workers, the International Institute of Agriculture at Rome, the International Federation of Trades Unions, and the International Association for the Legal Protection of Workers.

The Court was thus seised of the question when it met on June 15, 1922. Oral statements were heard on behalf of the French, the British, the Portuguese, and the Hungarian governments.²⁶ It is notable that Hungary was not yet a member of the League. Arguments were also made on behalf of the International Agricultural Commission, the International Labor Office, and the International Federation of Trades Unions. On August 12, 1922, the Court gave the opinion²⁷ that the competence of the International Labor Organization does extend to international regulation of the conditions of labor of persons employed in agriculture; but only eight

²⁵ *League of Nations Off. Jour.*, June, 1922, p. 528.

²⁶ The arguments were held on July 3, 4, 5, 6, and 10; they are reproduced in the International Labor Office *Official Bulletin*, July 26, 1922, pp. 122-207. For supplementary memoranda submitted by MM. de Lapradelle and Albert Thomas, see *Ibid.*, August 30, 1922, pp. 312-327.

²⁷ *Publications of Permanent Court of International Justice*, Series B, No. 2. The text is reproduced in the International Labor Office *Official Bulletin*, September 6, 1922, p. 339.

of the judges agreed on this, Deputy Judge Beichmann²⁸ having been compelled to leave before the terms of the opinion were finally settled, and Judge Weiss and Deputy Judge Negulesco declaring that they were "unable to concur in the opinion given by the Court." No reasons were given by the dissenting judges. The majority found the language of the Treaty of Versailles free of any ambiguity on the point, and thought that "every argument used for the exclusion of agriculture might with equal force be used for the exclusion of navigation and fisheries." Weight was also attached to the fact that at various times action taken under the treaty had been predicated on the assumption of competence. The opinion of the Court was duly communicated to the Council, and by the Council to the French government.²⁹

*Agricultural Production and the International
Labor Organization*

On June 13, 1922, the French government addressed a communication to the Secretary-General, asking that the Council request the Court to give a "supplementary opinion" (*avis complémentaire*) on the following question: "Does examination of proposals for the organization and development of methods of agricultural production, and of other questions of a like character, fall within the competence of the International Labor Organization?"³⁰ It was stated to be the desire of the French government that the question of the competence of the Labor Organization should be examined in all its bearings by the Court, and it was suggested that the question as to agricultural labor then pending might be consolidated with the new question as to agricul-

²⁸ Judge Barbosa and Judge Huber did not attend the session of the Court, which lasted from June 15 to August 12, 1922. They were replaced by Deputy Judges Beichmann and Negulesco.

²⁹ The opinion was not without its repercussions in various countries, particularly France. It gave rise to most unfortunate recriminations in *Le Temps* of August 17, 1922.

³⁰ The text of M. Poincaré's letter is reproduced in *League of Nations Off. Jour.*, August, 1922, p. 892.

tural production. When he was informed of the new move, the Director of the International Labor Office expressed "surprise and regret" at the procedure followed by the French government in approaching the Council without first bringing the matter before the Governing Body of the International Labor Office, and declared "categorically" that the International Labor Organization did not claim to have competence as to agricultural production.³¹ It was explained that negotiations between the International Labor Office and the International Institute of Agriculture had brought a common view to the two organizations, that "agricultural production" was more properly within the sphere of the latter organization. On July 18, 1922, at its nineteenth session, the Council considered the French demand, and decided to ask the Court for an opinion as the French government requested,³² and its request was at once transmitted to the Court, which was then considering the question of competence as to agricultural labor. Due notification was sent to all members of the League of Nations, to all other states named in the Annex to the Covenant, to Germany, to Hungary, and to the International Institute of Agriculture.

The Court was thus in session when it became seised of this third question. It heard arguments on behalf of the French government and the International Labor Office.³³ On August 12, 1922, the Court expressed the unanimous opinion that, while the organization and development of the "means of production" are not committed to the International Labor Organization, it is not necessary for the Organization to "exclude totally from its consideration the effect upon production of measures which it may seek to promote for the benefit of the workers." The Court found it impossible to pass on the Labor Organization's competence as to

³¹ The very forceful memorandum of the International Labor Office is reproduced in *League of Nations Off. Jour.*, August, 1922, p. 896.

³² *Ibid.*, p. 794.

³³ M. de Lapradelle's argument before the Court on August 3, 1922, is reprinted in the International Labor Office *Official Bulletin*, September 13, 1922, p. 389. M. Albert Thomas's argument on August 8, 1922, is reprinted in *Ibid.*, p. 398.

"other questions of a like character."³⁴ The opinion of the Court was duly communicated to the Council, and by the Council to the French government.

The first regular session of the Court was entirely occupied with these three matters. Between June 15 and August 12 fifty meetings were held, fifteen of them in public.

OTHER QUESTIONS REFERRED TO THE COURT

On August 11, 1922, the British government addressed a communication to the Secretary-General of the League asking that the following item be placed on the agenda of the Council for its next meeting: "Dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French Zone) on November 8, 1921, and their application to British subjects, the French government having refused to submit the legal questions involved to arbitration."³⁵ The matter was later made the subject of "friendly conversations" between the French and British representatives on the Council. It came before the Council itself on October 4, 1922, and the following action was taken: "The Council decides to refer to the Permanent Court of International Justice for its opinion the question whether the dispute referred to is or is not by international law solely a matter of domestic jurisdiction (Article 15, paragraph 8 of the Covenant)."³⁶ The Council also took note of an agreement between the two governments that, if the Court should decide that the matter is not solely a matter of domestic jurisdiction, the whole dispute should be referred to arbitration or to judicial settlement. The Court became formally seised of the question on November 6, 1922, and the meeting to consider it was set for January 8, 1923.³⁷

³⁴ *Publications of the Permanent Court of International Justice*, Series B, No. 3. The text is reproduced in the International Labor Office *Official Bulletin*, September 13, 1922, p. 377. This opinion, like the second, was rendered in French and English, the English being authoritative. The Court's first opinion was rendered in French and English, the French being authoritative.

³⁵ *League of Nations Off. Jour.*, November, 1922, p. 1206.

³⁶ *Ibid.*, p. 1207.

³⁷ *Vide post*, pp. 48-53.

Announcement has also been made of a decision by the Conference of Ambassadors on October 26, 1922, to ask the Council to refer to the Court a question regarding the régime of the Kiel Canal under Article 380 of the Treaty of Versailles.³⁸ The question has been discussed between the Allied Powers and Germany since 1920, when passage through the Canal was refused by Germany to a French chartered ship carrying munitions to Poland, during the war between Poland and Russia.

JURISDICTION OF THE COURT

Although the Council and Assembly refused to include in the final Statute of the Court the provisions for "compulsory jurisdiction" which were recommended by the Committee of Jurists,³⁹ the protocol contains an "optional clause" to be signed by states desiring to "accept as compulsory *ipso facto*, and without special convention, the jurisdiction" described in Article 36 of the Statute. This "optional clause" has now (December 1, 1922) been accepted by fourteen states,⁴⁰ including the following: Austria, Brazil, Bulgaria, China, Denmark, Esthonia, Haiti, Lithuania, Netherlands, Norway, Portugal, Sweden, Switzerland, Uruguay. [On December 1, 1924, twenty-three states had signed this clause.]

In addition to this, however, a number of special treaties confer on the Court a jurisdiction which may be called "compulsory." The Treaty of Versailles with Germany, the Treaty of St. Germain with Austria, the Treaty of Neuilly with Bulgaria, and the Treaty of Trianon with Hungary, all contain provisions which make obligatory the reference to the Court of certain disputes.⁴¹ The special treaties for the

³⁸ *New York Times*, October 27, 1922.

³⁹ For an appraisal of this action, see Judge Loder's illuminating paper in the *British Year Book of International Law*, 1921-22, p. 6.

⁴⁰ *League of Nations Off. Jour.*, September, 1922, p. 1025. Esthonia ratified the optional clause on June 29, 1922, but the Secretary-General was not notified of it until September 16, 1922. [For an up-to-date list of signatures and ratifications, see Appendix I, *post*, p. 339.]

⁴¹ These articles of the various treaties are listed in the author's article on "The Permanent Court of International Justice," *Harv. Law Rev.*, xxxv, 245, 260. See

protection of minorities, concluded by the Principal Allied and Associated Powers with Poland, Czechoslovakia, Roumania, the Serb-Croat-Slovene State, Greece, and Armenia,⁴² give the Court obligatory jurisdiction of certain questions. The Statute annexed to the Barcelona Convention on Freedom of Transit (Art. 13) and the Statute annexed to the Barcelona Convention on Navigable Waterways (Art. 22) both confer jurisdiction on the Court.⁴³ Likewise the Convention on the Regulation of Aerial Traffic of October 13, 1919 (Art. 37).⁴⁴

On November 17, 1921, the Czechoslovak government informed the Secretary-General of the League that it had entered into a special agreement with Poland, "in which among other things prominence is given to the idea of settling all future disputes between the two states by means of compulsory arbitration," and stating that "it is intended if necessary to appeal to the Court of International Justice set up by the League."⁴⁵ On December 21, 1921, the Secretary-General was informed of a somewhat similar agreement between Austria and Czechoslovakia.

The Court has an extensive jurisdiction with reference to the interpretation and application of the mandates. The five "C" mandates, as they were finally approved by the Council on December 17, 1920,⁴⁶ contain the following clause:

also the fuller and most useful article by Professor Blociszewski, "De la Compétence de la Cour Permanente de Justice Internationale," *Revue Générale de Droit International Public*, 1922, p. 23. The peace treaties also contain a number of provisions for handling disputes as the League of Nations may provide. See also Sophy Sanger, "The Permanent Court of International Justice and Labor Cases," *Proceedings of the International Law Association*, 1921, p. 46.

⁴² The treaties with Greece and Armenia have not been ratified.

⁴³ On the ratification of these Barcelona Conventions, see *League of Nations Off. Jour.*, September, 1922, p. 1025. The texts of the Barcelona Conventions have been published in *League of Nations, Treaty Series*, vii, 11 *et seq.*

⁴⁴ *British White Papers*, 1920, Cmd. 670.

⁴⁵ *League of Nations Off. Jour.*, January, 1922, p. 59. Apparently, this agreement has not been registered with the Secretariat. The notification was published in *Ibid.*, p. 60.

⁴⁶ *Ibid.*, January-February, 1921, pp. 84-95. The text of the Japanese mandate, including this article, is recited in the treaty between the United States and Japan of February 11, 1922, reproduced in *Amer. Jour. Int. Law, Supp.*, xvi, 94. See also *U. S. Treaties and Conventions*, iii, 2723.

The Mandatory agrees that if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

A similar clause was included in the "B" mandates approved by the Council on July 20, 1922⁴⁷ – the Belgian and British mandates for East Africa, and the British and French mandates for Togoland and the Cameroons. The British mandate for East Africa contains⁴⁸ the additional provision that "States Members of the League of Nations may likewise bring any claims on behalf of their nationals for infractions of their rights under this mandate before the said Court for decision." On July 24, 1922, the Council approved two "A" mandates, the British mandate for Palestine⁴⁹ and the French mandate for Syria and the Lebanon,⁵⁰ which include a provision similar to that found in the "C" and "B" mandates.

It is significant also that in the recent Treaty of Baghdad, of October 10, 1922, between Great Britain and Iraq, it is provided (Art. 17) that "any difference that may arise between the High Contracting Parties as to the interpretation of the provisions of this Treaty shall be referred to the Permanent Court of International Justice."⁵¹

FINANCES OF THE COURT

It is provided by the Statute of the Court (Art. 33) that its expenses "shall be borne by the League of Nations in such a manner as shall be decided by the Assembly upon the proposal of the Council." On July 17, 1922, the Council passed a resolution proposing to the Assembly that "the expenses of the Court shall, for the present, be incorporated in the general budget of the League and paid out of the ordinary

⁴⁷ *League of Nations Off. Jour.*, August, 1922, pp. 847-892.

⁴⁸ *Ibid.*, p. 865.

⁴⁹ *Ibid.*, p. 1007.

⁵⁰ *Ibid.*, p. 1013.

⁵¹ *British White Papers*, 1922, Cmd. 1757, p. 5.

funds of the League."⁵² This proposal was accepted by the Third Assembly on September 29, 1922, by incorporating into the budget of the League for 1923 an item of 1,800,000 gold francs for the Court.⁵³ Under the new *barême* for allocation of expenses, adopted by the Third Assembly on September 30, 1922,⁵⁴ the largest quota, ninety-five units, is paid by the British Empire, exclusive of the Dominions; her share of the 1923 budget will therefore be 189,194 gold francs.

The salaries of the judges were fixed by the First Assembly on December 18, 1920.⁵⁵ Special *ad hoc* judges, selected in accordance with Article 31 of the Court Statute, and technical assessors, selected in accordance with Articles 26 and 27 of the Court Statute, will receive fixed indemnities.⁵⁶

RECEPTION OF THE COURT

Of course, the real test of the reception of the Court by the peoples of the world will come in the action of their governments as disputes arise. It is too early to say whether the new Court will be generally utilized, in preference to arbitration before tribunals of the Permanent Court of Arbitration and tribunals independently set up by special agreement. By the agreement of June 30, 1921, the United States and Norway created a special tribunal to arbitrate the claim of Norway to compensation for the seizure of ships under construction in the United States in 1917;⁵⁷ but that agreement was made before the new Court was in being. Quite recently, on November 1, 1922, Great Britain and Costa Rica have chosen Chief Justice Taft as arbiter of a dispute.⁵⁸ No doubt instances will continue to arise in which

⁵² *League of Nations Off. Jour.*, August, 1922, p. 787.

⁵³ The expenses of organizing and maintaining the Court to date have been: for 1920, 124,499 gold francs; for 1921, 339,603 gold francs; for 1922, 1,500,000 gold francs. See *League of Nations Audited Accounts for Third Fiscal Period*, Doc. A. 13 (1). 1922. X.

⁵⁴ Document C. 715. M. 427. 1922. X.

⁵⁵ *Records of the First Assembly*, Plenary Meetings, p. 765.

⁵⁶ *League of Nations Off. Jour.*, August, 1922, p. 786; *Ibid.*, Spec. Supp. No. 9, p. 11. The Assembly resolution to this effect was adopted on September 23, 1922.

⁵⁷ *U. S. Treaty Series*, No. 654.

⁵⁸ *New York Times*, November 2, 1922.

a smaller tribunal of specially picked judges will be preferred to the new Court. But the field is large in which resort must be had to the permanent body, and its first year is very reassuring in this respect.

Even more encouraging than its record to date is the acclaim with which the establishment of the Court has been heralded by lawyers during the past two years. Adverse criticism has been very rare, and scepticism has seldom been voiced. The attitude generally expressed by the legal profession is like that of the ex-Attorney-General of England, Sir Ernest Pollock: "May we not as lawyers regard the establishment of an International Court of Justice as an advance in the science which we pursue?"⁵⁹ In America, the comment has been almost universally favorable.⁶⁰ Dean Wigmore exclaimed with jubilation that "it should have given to every lawyer a thrill of cosmic vibration" to learn of the establish-

⁵⁹ In *Cambridge Law Journal*, i, 41.

⁶⁰ See Chief Justice Taft in *American Bar Association Journal*, viii, 569; John Bassett Moore in *Columbia Law Review*, xxii, 497; Elihu Root in *American Bar Association Journal*, vi, 181 (reprinted in *Kentucky Law Journal*, ix, 109); John W. Davis in *American Bar Association Journal*, viii, 77 (reprinted in *West Virginia Law Quarterly*, xxviii, 161); W. J. Curtis in *American Bar Association Journal*, viii, 158; William D. Guthrie in *N. Y. Law Journal*, lxvi, 1401; E. D. Dickinson in *Michigan Law Review*, xi, 413; Frank E. Hinckley in *California Law Review*, x, 103; David Jayne Hill in *Amer. Jour. Int. Law*, xiv, 387; R. L. Buell in *Current History* for December, 1922; E. M. Borchard in *Illinois Law Quarterly*, iv, 67; Manley O. Hudson in *Harv. Law Rev.*, xxxv, 245, and *American Bar Association Journal*, viii, 83. See also the various papers in *The Annals*, July, 1921, pp. 98-137. See also Lord Sterndale in *Solicitors' Journal*, lxvi, 393; Lord Sumner in *Law Times*, cli, 349; Sir Erle Richards in the *British Year Book of International Law*, 1921-22, p. 1; Lord Phillimore in *Transactions of Grotius Society*, vi, 89; William Latey in *Journal of Comparative Legislation and International Law* (3d ser.), iv, 89; F. N. Keen in *League of Nations Union Pamphlets*, No. 91; Newton W. Rowell in 1921 *Proceedings of Canadian Bar Association*, p. 162; editorials in *Solicitors' Law Journal*, lxvi, 275 — "a solid gain to civilization and the peace of the world"; *Canadian Law Journal*, lviii, 81; *South African Law Journal*, xxxviii, 63; *Ibid.*, xxxix, 14, 207. See also Ruegger, "La Constitution de la Cour Permanente de Justice Internationale," *La Revue de Genève*, February, 1922, p. 271; Altamira, *El Proceso Ideológico del Proyecto de Tribunal de Justicia Internacional* (Madrid, 1921); Bourquin, *Revue de Droit International et de Législation Comparée* (3d ser.), ii, 17; Yamada, *Japanese Review of International Law*, xxi, Nos. 2 and 6; Morellet, *L'Organisation de la Cour Permanente de Justice Internationale* (1921); Cosme de la Torriente, "Cuba, Bustamante y el Tribunal Permanente de Justicia Internacional," in *Carnegie Endowment, Year-Book*, 1922, p. 155. An English translation of the last-named is published in the pamphlets of the International Conciliation, New York, No. 178.

ment of the Court;⁶¹ and Dr. James Brown Scott exults that "one dream of the ages has been realized in our time."⁶² American confidence has been increased, also, by the satisfaction with which lawyers throughout the United States have received the election of John Bassett Moore as one of the judges.

While the Government of the United States has taken no action with reference to the Court and has not in any way given its support, indications are not lacking that the establishment of the Court has received the cordial approval of Secretary Hughes who, in his address at Boston, on October 30, 1922, declared: "I believe that suitable arrangements can be made for the participation by this Government in the election of judges of the international court which has been set up, so that this Government may give its formal support to that court as an independent tribunal of international justice."⁶³

In other countries, American support of the Court seems also to be counted on. Dr. Hugh H. L. Bellot, addressing the University College in London in May, 1921, declared that "whether the United States entered the League or not, he was assured that she would never willingly let die a court in the creation of which she had played a great part, which formed a replica of her own Supreme Court, and which constituted a living expression of her own high ideals."⁶⁴

⁶¹ In *Illinois Law Review*, xvi, 207.

⁶³ *New York Times*, October 31, 1922.

⁶² *Amer. Jour. Int. Law*, xv, 558.

⁶⁴ *Law Times*, cli, 349.

III

THE SECOND YEAR OF THE COURT¹

A YEAR ago, when an attempt was made in this journal to describe the inauguration of the Permanent Court of International Justice and the beginning of its work,² it seemed that a new experiment in international relations was on trial. But such has been its progress in two years that the Court now appears to be one of the established institutions in our international life. The Foreign Offices have begun to regard it as a sort of international fixture. It is fast accumulating a record of achievement indispensable to the international law of the future, and the Court now bids fair to be permanent in influence as in name.

Two years ago a fear was entertained that the new Court might be neglected by the governments, and might be given little to do. The writer shared this fear to some extent, anticipating that "the new Permanent Court of International Justice may not be presented with a crowded docket for some time to come."³ Some assurance was found in the early history of the Supreme Court of the United States,⁴ which did not have a contested case until its sixth term. But the fear has already proved to have been groundless, for the Court's reception has greatly exceeded the general expectations. Not only have numerous questions come before

¹ Reprinted with slight revision and omissions from the *Amer. Jour. Int. Law* for January, 1924, xviii, 1-37.

² "The First Year of the Permanent Court of International Justice," by Manley O. Hudson, *Ibid.* (1923), xvii, 15.

³ "The Permanent Court of International Justice," by Manley O. Hudson, *Harv. Law Rev.* (January, 1922), xxxv, 245. See, however, Mr. Hammarskjöld's valuable article, "The Early Work of the Permanent Court of International Justice," *Ibid.*, xxxvi, 704.

⁴ The record of the early terms of the United States Supreme Court is in 2 Dallas, 399 ff. Professor Borchard seems to deny that this record affords any analogy. See *Proceedings of Academy of Political Science in the City of New York*, x, 137.

the Court in the first two years, but the existence of the Court has influenced the diplomatic handling of other questions. It is notable also that since the Court was created, no question has been referred to a tribunal of the Permanent Court of Arbitration,⁵ though various special arbitrations have been arranged. It now seems improbable that the new Court will be neglected because of a preference for specially chosen judges.⁶

When its first (extraordinary) session was ended on March 24, 1922, no question had yet been submitted to the Permanent Court of International Justice. During 1922 and 1923, nine questions have been disposed of. The first three, relating to the International Labor Organization, may be said to have been constitutional questions, of a sort which may frequently arise as the development of international organization proceeds in the future. The first (ordinary) session of the Court, from June 15 to August 12, 1922, was occupied with these three questions.⁷ The other six questions have all involved the application of conventional law, the issues arising out of differences in the interpretation of treaties. The fourth question, relating to the Tunis-Morocco nationality decrees, necessitated a second (extraordinary) session from January 8 to February 7, 1923. The Eastern Carelian ques-

⁵ The agreement for the Norwegian-American arbitration was signed on June 30, 1921, before the judges of the new Court had been elected; and strictly it may be contended that that case was not before a tribunal of the Permanent Court of Arbitration.

⁶ But see "Strength and Weakness of the New International Court," by Professor Edwin M. Borchard, *Illinois Law Quarterly* (February, 1922), iv, 67, 69. Mr. Borchard's suggestion that, as the judges' views become known, governments will be more reluctant to submit cases to the Court, seems to neglect the fact that the opinions and decisions are not handed down in the names of the particular judges.

⁷ For comment on these opinions, reference may be made to the earlier article in the *Amer. Jour. Int. Law* (1923), xvii, 18-23, and to Mr. Hammarskjöld's article in *Harv. Law Rev.*, xxxvi, 701, 717. See also "L'Organisation Permanente du Travail, Sa Compétence en Matière Agricole," by Maurice Guerreau, *Revue Générale de Droit International Public*, xxix, 223; and especially the discussion by Professor Mahaim in *Revue de Droit International et de Législation Comparée*, 3d ser., iii, 503, and by Sir Cecil Hurst in the *British Year Book of International Law*, for 1923-24, p. 172.

tion, the case of the S.S. *Wimbledon*, the question about the German settlers in Poland, and the question about the acquisition of Polish nationality, were all disposed of at the third (ordinary) session from June 15, 1923, to September 15, 1923. The question as to the boundary between Czechoslovakia and Poland called for a third (extraordinary) session, from November 12 to December 6, 1923.

THE TUNIS-MOROCCO NATIONALITY QUESTION

On August 11, 1922, the British government requested that the following item be placed on the agenda of the Council of the League of Nations: "Dispute between France and Great Britain as to the nationality decrees issued in Tunis and Morocco (French zone) on November 8, 1921, and their application to British subjects, the French Government having refused to submit the legal questions involved to arbitration." The matter came before the Council on October 2, 1922, when Lord Balfour (Great Britain) reported that "friendly conversations" had taken place, as a result of which he asked the Council to refer to the Permanent Court of International Justice the question "whether the dispute referred to above is or is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant)."⁸ M. Hanotaux (France)⁹ agreed to the suggestion, and the Council adopted a resolution proposed by Lord Balfour in that sense. The definitive text of the resolution was fixed on October 4.¹⁰ It states that "the Council takes note that the two governments have agreed that if the opinion of the Court upon the above question is that it is not solely a matter of domestic jurisdiction, the whole dispute will be referred to arbitration or to judicial settlement under conditions to be agreed between the governments."

By the resolution as redrafted on October 4, the Council requested "the two governments to bring this matter before

⁸ *League of Nations Off. Jour.*, November, 1922, p. 1207.

⁹ M. Bourgeois was named in the resolution as printed in *Ibid.*, p. 7.

¹⁰ *Ibid.*, p. 1209.

the Permanent Court of International Justice," after having "decided to refer" it "for opinion," and having directed the Secretary-General to "communicate" these paragraphs of the resolution to the Court. On October 4, 1922, the Secretary-General of the League of Nations transmitted to the Registrar of the Court a copy of the resolution of the Council "for the information" of the Court. This was not treated as a request for an advisory opinion as required by Article 72 of the rules of court, but such a request was sent on November 6.¹¹ The question was before the Court for an advisory opinion, therefore, though the Council left it to the French and British governments to "present statements of their respective cases directly to the Court," and asked that the Court "consult the convenience of the two governments, so far as its rules of procedure permit, with regard to the manner in which the subject should be considered and its opinion be given."

The President of the Court invited the French and British governments to state whether an extraordinary session of the Court should be summoned; if so, what date would be suitable; and what were their "special desires" as to procedure.¹² The two governments suggested January 8 as a date for an extraordinary session, and fixed November 25 as the date for the submission of cases, and December 23 as the date for the submission of counter-cases.¹³ The British government designated Mr. George Mounsey as agent, and the Right Honorable Sir Douglas Hogg, K. C., M. P., His Majesty's Attorney-General, and the Right Honorable Sir Ernest Pollock, Bart., K. B. E., K. C., M. P., as counsel; and the French government designated M. Mérillon as agent, and Professor de Lapradelle as *agent-adjoint*. Oral arguments

¹¹ The correspondence between the Secretary-General and the Registrar is published in *Acts and Documents*, No. 2, pp. 248 ff. (This volume is in the publications of the Court, Series C.)

¹² *Ibid.*, p. 263.

¹³ These documents have now been published by the Court. The French *contre-mémoire*, of 222 pages, contains a valuable collection of documents.

were made before the Court by representatives of the two governments. Indeed, although the matter was before the Court as a request for an advisory opinion, it was dealt with very much as if it had been a contested case between Great Britain and France. This view of the situation was stated by M. de Lapradelle, as follows: "Though, on the face of it, we are here simply to give you information to enable you to reply to the Council's request for an opinion, we have before us . . . what in reality amounts to an arbitration." He also spoke of the advisory procedure applied in this case as "merely a device."¹⁴ The arguments before the Court consumed five days, and twenty meetings were held during the session of the Court. The opinion was handed down on February 7.

The Court was very scrupulous in confining itself to the question before it, insisting throughout that it was dealing with the nature of the dispute, not with its merits. This attitude was punctiliously maintained, in spite of the frequent insistence of M. de Lapradelle that the question was submitted "on its merits, so closely interconnected are form and substance in this matter."¹⁵ Moreover, the French government in its draft of conclusions had stated that "the Court has not only the right but the duty, especially in view of the fact that it is solely a question of formulating an opinion, to examine the whole development of the questions submitted by the parties and to furnish all the decisive arguments for the ultimate deliberation."¹⁶

For the British government, it was contended that since each government relied "partly on questions of the existence or abrogation of treaties and of the construction of the terms of such treaties," the dispute was not by international law solely a matter of domestic jurisdiction. For the French government, it was contended that "the sovereign right of a nation to legislate upon nationality questions within its

¹⁴ See *Acts and Documents*, No. 2, pp. 52-53.

¹⁵ *Ibid.*, p. 56.

¹⁶ *Ibid.*, p. 241.

own territory governs the situation"; that its application could be prevented only by a recognized rule of international law or by a provision of international treaty; that Great Britain had no rights in Tunis except those conferred by treaties with France, and these were limited in Tunis as in France; that the French protectorates over both Tunis and Morocco, which had been recognized by other nations, demanded "the progressive assimilation of the customs and laws of the protectorate to those of the protecting country"; and that no special limit exists on the power to make nationality imposed *jure soli* "prevail over any other nationality based on the *jus sanguinis*."

The Court dealt with the matter "in the light of the provisions" of paragraph 8 of Article 15 of the Covenant. The following passage from the opinion may be of assistance in future efforts to apply those provisions, which are held not to lend themselves to "an extensive interpretation":

The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

The Aaland Islands case¹⁷ was cited as showing that a matter in dispute does not derive "international character calculated to except it from the application of paragraph 8 of Article 15" merely as a result of its being brought before the League of Nations, or as a result of appeals by a party "to engagements of an international character in order to contest the exclusive jurisdiction of the other" party.

The Court examined the French protectorates over Tunis and Morocco, and concluded that, while a state possesses exclusive jurisdiction in regard to nationality questions in its own territory, the question whether this extends to protected territory is a question of international law. The French government contended that treaties relied on by

¹⁷ See the *League of Nations Off. Jour.*, 1920, p. 249.

Great Britain had lapsed, "by virtue of the principle known as the *clausula rebus sic stantibus*," and this too was held to be a question of international law. The two governments also disagreed on the effect of declarations relating to Tunis, made by Great Britain,¹⁸ so that a question of international law was involved. There was a similar disaccord as to the effect of the arrangement of September 18, 1897, as to Tunis,¹⁹ and of the Franco-German convention of November 4, 1911,²⁰ as to Morocco. Great Britain also relied on the most-favored-nation clause in the Anglo-French arrangement of September 18, 1897, in order to assert a benefit under Article 13 of the Franco-Italian consular convention of September 28, 1896;²¹ while France contended that the most-favored-nation clause was limited to economic matters, and that the convention of September 28, 1896, was unavailable because of its synallagmatic character.²² This too was held to be a question not solely within the domestic jurisdiction of France. For all these reasons the Court unanimously, the judge of French nationality concurring, reached the opinion that the dispute was not by international law solely a matter of domestic jurisdiction.

On the announcement of this opinion, at the public sitting of February 7, 1923, the agent for the French government declared that "the French Government respectfully accepts a decision which does not give satisfaction to all its conclusions," and asked the Court "to place on record that the French Government proposes to the English Government that the case should be submitted on its merits to the Permanent Court of International Justice."²³ The agent for the British government stated that his government would "give

¹⁸ See especially the Order in Council of December 31, 1883. *British and Foreign State Papers*, lxxiv, 694.

¹⁹ *Ibid.*, lxxxix, 40.

²⁰ *Ibid.*, civ, 948.

²¹ *Ibid.*, lxxxviii, 720, 733. [Cf. the extensive study in the *Revue de Droit International Privé*, xviii, 1-287.]

²² Cf. the American restriction on interpretation of the most-favored-nation clause. Hyde, *International Law*, ii, 73.

²³ *Acts and Documents*, No. 2, p. 13.

careful consideration to any proposals which the French Government may see fit to address to them." When the Court again met on June 15, 1923, the President announced the receipt of a letter from the French Minister at The Hague and a letter from the British Chargé d'Affaires at The Hague, both under date of June 7, 1923, informing him that an amicable arrangement had been concluded on May 24 closing the matter, and that the two governments had therefore decided to stop the proceedings before the Court.²⁴

An American writer, Mr. Charles Noble Gregory, has sharply criticized the Court for its opinion in this case,²⁵ stating that the Court had been "controlled by no code," had shown "little of conservatism," and had struck an "exotic note." His statement that the judges fell fast asleep during the argument was admittedly based on "private information" and is obviously the kind of statement which has no place in a serious discussion of a judicial opinion. But his particular criticism seems to be that the Court did not sufficiently rely on precedent, and he finds a "departure from English and American precedent." It would be exceedingly strange

²⁴ The British Chargé d'Affaires communicated copies of the notes exchanged embodying the terms of the amicable arrangement. Document C. 422. M. 186. 1923. V. These terms are:

(a) The French Government agreed to make arrangements before January 1, 1924, whereby a British national who is the child born in Tunis of a British national who was himself born there shall be entitled to decline French nationality, it being understood, however, that this right will not extend to succeeding generations.

(b) A child born in Tunis of a British national born elsewhere than in Tunis is not claimed to possess French nationality, and French nationality will not be imposed on any British national born in Tunis before November 8, 1921, without an opportunity being afforded to him to decline it.

(c) No attempt will be made to impose Turisian nationality instead of French nationality on British nationals in Tunis.

(d) Neither government abandons its point of view maintained either in the diplomatic correspondence or in the preliminary proceedings at The Hague; nor will the principle adopted in the present agreement be applicable elsewhere than in Tunis.

(e) The application to British subjects of the similar nationality decrees promulgated in Morocco (French zone) will not for the present give rise to further proceedings at The Hague, since this question has at present no practical importance. On this question, the two governments reserve their rights. See *British Treaty Series*, No. 11 (1923), Cmd. 1899.

²⁵ In the *Amer. Jour. Int. Law* (1923), xvii, 298-307.

if an international tribunal should acknowledge itself bound to follow "English and American precedent" or practice. Moreover, the writer failed to refer to any available precedents to which the Court might have referred. Indeed, it was a situation where precedents were lacking, though the Court did refer to the Aaland Islands case in support of its view. Mr. Gregory called the opinion a "decision," and this may have been one of the reasons for his neglecting the limits within which the Court acted, and for his permitting himself to "look to the uncharted course of the high tribunal with real solicitude."

THE EASTERN CARELIA QUESTION

On October 14, 1920, a peace treaty was concluded at Dorpat between the Republic of Finland and the Russian Socialist Federal Soviet Republic, the text being in the Finnish, Swedish and Russian languages.²⁶ Articles 10 and 11 of this treaty refer to the "autonomous territory of Eastern Carelia," and confer certain rights on the "Carelian population of the Governments of Archangel and Olonetz," "which shall enjoy the national right of self-determination." At the general meeting of the peace delegates on October 14, 1920, a declaration was inserted in the *procès-verbal* on behalf of the Russian delegation, by which certain rights were guaranteed to the Carelian population of the governments of Archangel and Olonetz (Aunus).²⁷ On December 31, 1920, ratifications of the treaty were exchanged at Moscow, but the *procès-verbal* of the exchange does not mention the declaration.²⁸ On the same date a *procès-verbal* of signature of a French text of the treaty was drawn up, referring to "all relevant acts" in addition to the treaty.

²⁶ League of Nations, *Treaty Series*, iii, 5.

²⁷ An English translation is published in *Ibid.*, p. 76. On the general question, see "La Question de la Carélie Orientale," by Professor R. Erich, in *Revue de Droit International et de Législation Comparée*, 3d ser., iii, 1.

²⁸ The text of the *procès-verbal* is published in League of Nations, *Treaty Series*, iii, 79.

In the latter part of 1921, the Carelian population rose in insurrection and on November 26, 1921, the Finnish government addressed a letter to the Council of the League of Nations, complaining of the non-execution of the guarantees, and asking the Council to consider the advisability of instituting an enquiry with a view to subsequent discussion. The matter came before the Council of the League on January 14, 1922, and the Council expressed a willingness "to consider the question with a view to arriving at a satisfactory solution if the two parties concerned agree," and further expressed the "opinion that one of the interested states, member of the League,²⁹ which is in diplomatic relations with the government of Moscow, might ascertain that government's intentions in that respect."³⁰

In pursuance of this resolution, the Esthonian government exchanged notes with the Russian government and invited the latter to submit the question to the Council "on the basis of Article 17 of the Covenant." But the steps taken "led to no result, as the Soviet Government adopted the attitude that the question of Eastern Carelia was to be regarded as one of a purely domestic character."³¹ The Russian government seems also to have contended that the provisions of the treaty and declarations of Dorpat "were only intended as information regarding a situation already existing" under a decree of June 8, 1920, and to have regarded the French text as inaccurate.³²

On November 10, 1922, the Finnish government addressed a letter to the Council of the League of Nations (received on January 17, 1923) expressing the desire that the Council "request the Permanent Court of International Justice to adjudicate not only upon the legal aspect of the question but also upon the other differences of opinion to which this question

²⁹ Statements had been submitted by the Esthonian, Latvian, Lithuanian, and Polish governments.

³⁰ *League of Nations Off. Jour.*, 1922, p. 108.

³¹ See memorandum by the Secretary-General, of February 1, 1923, in *Ibid.*, 1923, p. 343.

³² See statement by M. Enckell, in *Ibid.*, p. 222.

has given rise." When this request came before the Council on February 1, 1923, consideration of the question was adjourned to the Council's next session.³³ On April 20, 1923, the matter again came before the Council, and M. Enckell on behalf of Finland submitted a statement expressing the view that an opinion by the Court would "introduce a pacific influence on the parties," and could afford a basis for a renewal of the offer of good offices by other states. He also submitted a very frank and able memorandum by Professors Chydenius, Erich, and Hermanson of the University of Helsingfors.³⁴ On April 21, 1923, the Council decided to ask the Court for an advisory opinion on the following question:

Do Articles 10 and 11 of the treaty of peace between Finland and Russia signed at Dorpat on October 14, 1920, and the annexed declaration of the Russian delegation regarding the autonomy of Eastern Carelia constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying-out of the provisions contained therein? ³⁵

In addition the Secretary-General was authorized to inform the Court of the action taken by the Council, to submit all the relevant documents, to give all necessary assistance in the examination of the question, and "to make arrangements to be represented if necessary at the Court."³⁶ On April 27, the Secretary-General addressed a formal request to the Court.

Notice of this request was sent, in accordance with Article 73 of the rules of court, to all members of the League and to other states mentioned in the Annex to the Covenant, including the United States. The Registrar was also directed to notify the Russian government.³⁷ A telegraphic reply was

³³ *League of Nations Off. Jour.*, 1923, p. 222.

³⁴ Reprinted in *Ibid.*, p. 661. See also the opinions of Professors de Visscher of Ghent, Lie of Christiania, and Berlin of Copenhagen, in a brochure published by the "Carelian Delegation" in 1922.

³⁵ *Ibid.*, p. 578.

³⁶ This statement has been incorporated in all the recent resolutions requesting advisory opinions.

³⁷ The Registrar's letter of May 19, 1923, to the Russian People's Commissary for Foreign Affairs, stated: "Notice is hereby given in accordance with the principle,

received from M. Tchitcherin, the Russian Peoples' Commissary for Foreign Affairs, dated June 11, 1923, stating that the Russian government found it impossible to take any part in the proceedings, which were without legal value, resuming the position previously taken by the Russian government, and referring to an official communication of June 18, 1922, repudiating "the claim of the so-called League of Nations to intervene in the question of the internal situation of Carelia."³⁸

When the Court met to consider the matter, it intimated to M. Erich, the agent of Finland, that it would be glad to have his views on the question of its competence. The argument by M. Erich on June 22 and 26 dealt with both the competence of the Court and the merits of the Russian arguments. On July 23, 1923, the Court handed down the conclusions of the majority of seven judges (in which Judges Weiss, Nyholm, de Bustamante and Altamira did not share) which are referred to by the majority as an "opinion" and published as No. 5 in the *Collection of Advisory Opinions*. The majority analyzed very carefully the nature of the dispute, saying that there was no question about the existence of the treaty of Dorpat, but that the "parties" differed as to its interpretation and divided on whether the declaration constituted part of its terms. The question whether the declaration formed part of the obligations into which Russia entered was said to be a "question of fact." The Court found itself asked to give an opinion bearing on an actual dispute between Finland and Russia. "Answering the question would be substantially equivalent to deciding the dispute between the parties." It was somewhat vaguely declared that "the case is one under Article 17 of the Covenant," apparently to show that Russian consent was necessary. As

laid down in the rules of court, according to which governments and international organizations, which are likely to be able to furnish information on a question submitted to the Court for an advisory opinion, shall receive notice of such question." Cf. rules of court, Article 73.

³⁸ For the text, see Advisory Opinion No. 5, pp. 12-14.

Russia had never consented to any submission of the dispute, the majority concluded that it was impossible for the Court to give the opinion requested.

For various reasons, also, the majority thought it "very inexpedient" for the Court to attempt to deal with the question. The attendance of witnesses might be necessary. It was doubtful whether the Court had available materials sufficient for a judicial conclusion upon the question of fact as to what the parties did agree to. The necessary investigation would require the consent and coöperation of both parties.

Yet the Court did not "regret that the question has been put, as all must now realize that the Council has spared no pains in exploring every avenue which might possibly lead to some solution with a view to settling a dispute between two nations."

Apart from any appraisal of the conclusion at which the Court arrived, it seems indisputable that the judges acted under a very proper sense of the limitations surrounding judicial action. Moreover, the dignity and force of advisory opinions is protected by the Court's attitude towards its function. It is a welcome declaration that "the Court, being a court of justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a court."³⁹

This "opinion" was communicated to the Council of the League of Nations, and to all members of the League. On September 27, 1923, the Council took note of the Court's action, but entered a *caveat* "that the opinion expressed by the Court in connection with the procedure described by Article 17 of the Covenant could not exclude the possibility of resort by the Council to any action, including a request for an advisory opinion from the Court, in a matter to which a state non-Member of the League and unwilling to give information, is involved, if the circumstances should make such

³⁹ Advisory Opinion No. 5, p. 24.

action necessary to enable the Council to fulfil its functions under the Covenant of the League in the interests of peace.”⁴⁰

On September 24, 1923, the question came before the Fourth Assembly of the League of Nations, which noted the declaration of the Finnish delegation that “the Finnish Government, in the absence of any decision or any contrary opinion pronounced by any international jurisdiction, maintains its right to consider the clauses of the treaty of Dorpat and the supplementary declarations relating to the status of Eastern Carelia, as agreements of an international order.” The Assembly further requested the Council to continue to collect information relating to the question, “with a view to seeking any satisfactory solution rendered possible by subsequent events.”⁴¹

THE S.S. WIMBLEDON CASE

On January 16, 1923, the British, French, Italian, and Japanese governments, acting conjointly as the Principal Allied and Associated Powers, designated by the Treaty of Versailles of June 28, 1919, made “application” under Article 40 of the Statute of the Court and Article 35 of the rules of court, asking the Court to give judgment, whether the German government be “present or absent,” that “the German authorities wrongfully refused, on March 21, 1921, free access to the Kiel Canal of the steamship *Wimbledon*,” a British steamship chartered by the French armament firm, Les Affréteurs Réunis, and that the German government make reparation for the losses incurred in consequence of this action. The application set forth “a succinct statement of facts, an indication of the claim and the address selected” by the applicants at The Hague.⁴²

The application stated that the *Wimbledon* was not per-

⁴⁰ Document C. 642. (1). 1923. V. The discussion in the Council is reported in the *procès-verbal* of the 26th session, *League of Nations Off. Jour.*, November, 1923, pp. 1335-1337.

⁴¹ *Ibid.*, Special Supplement No. 11, p. 29.

⁴² Following Article 35 of the rules of court.

mitted to pass through the Kiel Canal while proceeding to Danzig with a cargo of military material; and that on March 23, 1921, the refusal had been reaffirmed, on protest by the French Ambassador at Berlin, the German government contending that the cargo of the *Wimbledon* consisted of war material destined for Poland, then at war with Russia, and hence its transit across German territory was forbidden by neutrality regulations in force. The applicants based their claim on Article 380 of the Treaty of Versailles of June 28, 1919.⁴³ To vest jurisdiction in the Court, whether the German government be "present or absent," the applicant Powers relied on Article 386 of the Treaty of Versailles⁴⁴ and Article 37 of the Statute of the Court.⁴⁵

On May 22, 1923, the Polish government applied to intervene in the case under Article 62 of the Statute and Articles 58 and 59 of the rules of court, as one of the parties to the Treaty of Versailles whose rights and material advantages guaranteed by Article 380 of that treaty had been violated. Arguments on this application to intervene were heard by the Court on June 25, 1923, when the Polish government abandoned its claim to intervene under Article 62, and its claim for special damages, and placed its application under Article 63 of the Statute. Such intervention was allowed by the Court in an opinion handed down on June 28.

The German government does not seem to have contested the Court's jurisdiction under Article 386 of the Treaty of Versailles. That article provides for appeal to a "jurisdiction instituted for the purpose by the League of Nations." On September 16, 1920, the German government itself suggested

⁴³ "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality."

⁴⁴ The first paragraph reads: "In the event of any violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations."

⁴⁵ "When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal."

appeal to such a jurisdiction, in connection with the affair of the *S.S. Dorrit*.⁴⁶ Article 37 of the Statute of the Court, to the protocol establishing which Germany is not a party, provides that "when a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal." But this can hardly be said to have made the Court the "jurisdiction instituted for the purpose by the League of Nations." It is not necessary to consider the effect of Article 22 of the Convention on the Régime of Navigable Waterways of International Concern, concluded at Barcelona, on April 20, 1921.⁴⁷

On January 28, 1922, in the course of the diplomatic correspondence which followed the stopping of the *Wimbledon*, the German government, denying the competence of the Conference of Ambassadors to decide such a question, alluded to "the court of justice instituted expressly by Article 386 of the Treaty of Versailles for such differences of opinion," and demanded that the matter be placed before "the jurisdiction provided for in the treaty."⁴⁸ This demand was later agreed to by the Conference of Ambassadors, which, on November 16, 1922, "accepted that the affair be put before the Permanent Court of International Justice at The Hague."

Under Article 31 of the Statute, Professor Schücking was named by Germany as a national judge to sit in the case. It is notable that he participated in the opinion admitting the intervention of Poland. But no question seems to have arisen as to Poland's having a national among the judges, as an intervening party.

The applicants submitted a case on March 17, 1923, and a reply on May 18, 1923; and the respondent submitted a counter-case on April 20, 1923, and a rejoinder on June 15,

⁴⁶ In a letter from the President of the German delegation at Paris to the President of the Conference of Ambassadors, reprinted in the applicant Powers' *Mémoire*, p. 22.

⁴⁷ See League of Nations, *Treaty Series*, vii, 35; xi, 406.

⁴⁸ See the applicant Powers' *Mémoire*, p. 29.

1923. The British government was represented before the Court by Sir Cecil Hurst; the French government by Professor Basdevant; the Italian government by Commendatore Pilotti; the Japanese government by M. Ito; the Polish government by M. Olechowski, and the German government by M. Schiffer. The German government raised a point as to the *locus standi* of the four applicants, but the Court thought this clear.

The facts were not in dispute. The parties had not agreed, however, as to whether Poland and Russia were still at war on March 21, 1921. An armistice and preliminary peace treaty had been signed at Riga on October 12, 1920,⁴⁹ and put into force on November 2, 1920, and a definitive treaty of peace was signed at Riga on March 18, 1921, but ratifications were not exchanged until April 30, 1921.⁵⁰ The question, therefore, as to when the state of war ended, was extensively discussed in diplomatic correspondence and in the case and counter-case. But the majority of the judges found it unnecessary to consider the point.

The chief problem raised related to the construction of Article 380 of the Treaty of Versailles, and it is this problem on which the Court divided by nine to three, in handing down a decision on August 17, 1923. The majority decided that the clear effect of the article was to make the Kiel Canal an international waterway, open equally to vessels of commerce and war vessels belonging to nations at peace with Germany. While disposed to give the limitation on Germany's sovereign power a restrictive interpretation, the "plain terms of the article" were not to be destroyed. The régimes of the Suez and Panama Canals were reviewed, to demonstrate that the passage of war vessels in time of war was not regarded as incompatible with the neutrality of the riparian sovereign. Germany was held to have no duty to refuse access to the *Wimbledon*, but a definite treaty duty to allow it.

⁴⁹ League of Nations, *Treaty Series*, iv, 7.

⁵⁰ *Ibid.*, vi, 51.

Judges Anzilotti and Huber found that Article 380 was dependent on the existence of a state of peace; that there was no intention to deprive Germany of power to take necessary measures to protect her paramount interests in event of war or neutrality; that Article 380 must be read with other Articles of Part XII; and that Germany was free to take non-arbitrary measures necessary to protect her interests as a belligerent or neutral power. In a separate dissenting opinion, Professor Schücking found that Article 380 imposed a servitude and was therefore to be interpreted restrictively with a view to protecting the vital interests of the servient state. He urged also that Germany's duties as a neutral toward Russia had not been affected by the Treaty of Versailles, and that as the cargo of the *Wimbledon* had been despatched by a Polish mission in Salonika, consigned to the naval base of the Polish state in Danzig, it was to be considered as a convoy⁵¹ and Germany owed Russia a duty to forbid its passage through the Kiel Canal.

The Court pronounced Germany to have been wrong in refusing access to the Kiel Canal to the S.S. *Wimbledon*; that Article 380 precluded Germany's applying the neutrality order of July 25, 1920;⁵² that the German government should make good the prejudice sustained, to the amount of 140,749.35 French francs, to be paid within three months, with interest at 6 per cent from the date of the judgment. As to costs, the Court refused to vary the rule of Article 64 of the Statute, leaving each party to bear its own costs. The satisfaction of the judgment has not yet been announced.

Like many cases of interpretation, this case represents a choice by the Court of one of two possible constructions to be put upon a text. The reasons for selecting the construction chosen are not of compelling force, and there were probably certain pragmatic tests in the minds of the judges

⁵¹ See the Hague Convention of 1907, respecting the rights and duties of neutral Powers and persons in case of war on land, Articles 2 and 7. Malloy, *Treaties*, ii, 2297-2298.

⁵² The order is to be found in *Reichs-Geetzblatt*, 1920, No. 158, p. 1469.

which were not brought out into the open. In this respect, the Court must resemble most national courts, and the judge's function differs only in degree from that of the legislator or treaty-maker whose selection is less limited.

The case is notable, however, for four things. It is the first exercise of the Court's jurisdiction in a contested case between states, for in all other instances the Court has been giving advisory opinions. It is the first exercise of the Court's compulsory jurisdiction conferred by special treaties. It is the first case in which a national judge has participated. And it is the first case in which a state has intervened under the procedure laid down in the Statute.

GERMAN SETTLERS IN POLAND

On November 9, 1921, the Secretary-General of the League of Nations received a telegram from the Germanic League of Bydgoszcz in Poland, informing him that several thousand Germanic farmers of both Polish and German nationality were about to be evicted from their farms by the Polish government.⁵³ In view of the urgency, the procedure outlined as to minority petitions in the Council resolutions of October 25, 1920,⁵⁴ and June 27, 1921,⁵⁵ was followed and the petition was both communicated to the Polish representative and referred to a committee consisting of the Belgian, Italian, and Japanese members of the Council. This committee reported to the Council on May 17, 1922, and the Council invited M. Askenazy, the Polish representative, to "consider, in conjunction with the Secretary-General, the various questions of law raised in the report, in order to enable the Council to decide whether, and if so, on what questions, the Permanent Court of International Justice should be asked to give an opinion."⁵⁶ Meanwhile, the Polish government

⁵³ The matter had been previously discussed in the Conference of Ambassadors. For previous history of the question, see Frances Kellor, *Security Against War* ii, 564 ff.

⁵⁴ *Minutes of Council*, 10th session, p. 33.

⁵⁵ *Ibid.*, 13th session, pp. 51, 235.

⁵⁶ *League of Nations Off. Jour.*, June, 1922, pp. 555, 702.

accepted various suggestions for the suspension of administrative or judicial measures changing the situation.

The matter was again considered by the Council on July 20, 1922,⁵⁷ and September 9, 1922,⁵⁸ and on the latter date the Council requested the Secretary-General to summon forthwith a committee of jurists to study the legal questions concerning the contracts of the German colonists established by the former German colonization commission, as well as the question of the interpretation of Article 4 of the Polish minorities treaty of June 28, 1919. This committee was asked to report at the current session of the Council. MM. Botella (Spain) and Fromageot (France), Sir Cecil Hurst (Great Britain), and Dr. van Hamel, Director of the Legal Section of the Secretariat, composed the committee. Their report⁵⁹ came before the Council on September 30, 1922, and was communicated to the Polish government. On December 7, 1922, the Polish Minister for Foreign Affairs communicated the views of his government, which declined to accept the report of the jurists. On February 2, 1923, the Council decided to request the opinion of the Court, and on February 3, 1923, the Council adopted the following resolution:⁶⁰

The Council of the League of Nations having been apprised of certain questions regarding the following facts:

(a) A number of colonists who were formerly German nationals, and who are now domiciled in Polish territory previously belonging to Germany, have acquired Polish nationality, particularly in virtue of Article 91 of the Treaty of Versailles. They are occupying their holdings under contracts (*Rentengutsverträge*) which, although concluded with the German colonization commission prior to the armistice of November 11, 1918, did not receive an *Auflassung* before that date. The Polish Government regards itself as the legitimate owner of these holdings under Article 256 of the Treaty of Versailles, and considers itself entitled to cancel the above contracts. In consequence, the Polish authorities have taken certain measures in regard to these colonists by which the latter will be expelled from the holdings which they occupy;

⁵⁷ *League of Nations Off. Jour.*, August, 1922, pp. 806, 917.

⁵⁸ *Ibid.*, November, 1922, pp. 1181, 1293.

⁵⁹ *Ibid.*, p. 1299.

⁶⁰ *Ibid.*, March, 1923, pp. 240, 395.

(b) The Polish authorities will not recognize leases conceded before November 11, 1918, by the German Government to German nationals who have now become Polish subjects. These are leases over German state properties which have subsequently been transferred to the Polish state in virtue of the Treaty of Versailles, in particular of Article 256:

Requests the Permanent Court of International Justice to give an advisory opinion on the following questions:

(1) Do the points referred to in (a) and (b) above involve international obligations of the kind contemplated by the treaty between the United States of America, the British Empire, France, Italy, Japan and Poland, signed at Versailles on June 28, 1919, and do these points come within the competence of the League of Nations as defined in that treaty?

(2) Should the first question be answered in the affirmative, the Council requests the Court to give an advisory opinion on the question whether the position adopted by the Polish Government, and referred to in (a) and (b) above, is in conformity with its international obligations.

The Secretary-General is authorized to submit this request to the Court, together with all the relevant documents, to explain to the Court the action taken by the Council in this matter, to give all assistance necessary in the examination of the question, and, if required, to take steps to be represented before the Court.

By a formal request of March 2, 1923, the Court became seised of the matter. On April 18, 1923, the Council acted on a request of the Polish government to "confirm" paragraph (b) of its resolution of February 3, "in order that it might be stated with the absolute clearness prescribed by Article 72 of the rules of court." To this end, it was stated "that paragraph (b) refers exclusively to the case of a special category of colonist farmers, namely, those who occupy holdings in virtue of leases contracted before the armistice and still unexpired and who subsequently obtained after the armistice amortization contracts (*Rentengutsverträge*) for these holdings."⁶¹ This decision was duly communicated to the Court.

Notice of the request for an advisory opinion was communicated to all members of the League, to other states mentioned in the Annex to the Covenant, and to the German government. On August 2 the Court heard statements by Count Rostworowski and Sir Ernest Pollock on behalf of Po-

⁶¹ *League of Nations Off. Jour.*, June, 1923, pp. 558, 637.

land, and by M. Schiffer on behalf of Germany. From these statements and the documents submitted, it appeared that Poland had acted on Article 256 of the Treaty of Versailles of June 28, 1919, to enact the law of July 14, 1920, substituting the treasury of the Polish state for the German state on the land registers and authorizing the expulsion of persons who occupied under contract with the German state or crown. The two questions before the Court related to (1) the competence of the Council to take cognizance of the matter under the Polish minorities treaty, and (2) the Council having been found competent, the right of the settlers to continue to hold the lands they occupy.

On September 10, 1923, the Court handed down a unanimous opinion. It first held that the Council was competent under paragraph 2 of Article 12 of the Polish minorities treaty and had properly exercised its competence in requesting the advisory opinion. No question arose therefore as to the Court's jurisdiction under paragraph 3 of Article 12 of the Polish minorities treaty. The necessity for consideration of Article 256 of the Treaty of Versailles was only incidental to the necessity for considering questions under the minorities treaty, and hence did not affect the competence of the Council.

As to the second question, the Court held that the armistice of November 11, 1918, had not invalidated the contracts under consideration, for the cession of German territories to Poland had not been effective until January 10, 1920, when the Treaty of Versailles came into force. The holders under *Rentengutsverträge* had not acquired legal ownership, before *Auflassung*, but had valid and enforceable contracts for which consideration had been paid. Such a holder was therefore said to be a purchaser who had acquired a *jus ad rem* which after *Auflassung* became a *jus in re*. Under the German law⁶² the state could be sued in the courts to enforce this right. "The fact that there was a political purpose behind the colo-

⁶² German Code of Civil Procedure, Introductory Act, Article 4.

nization scheme cannot affect the private rights acquired under the law." Such private rights were unaffected by the change of sovereignty, and were protected against the "virtual annulment" attempted under the law of July 14, 1920, by the equality provisions of the minorities treaty. The Treaty of Versailles had not diminished this protection, and neither it nor the armistice had forbidden the Prussian state to proceed to confirm the acquired rights with an *Auflösung* issued after November 11, 1918.

As to the leases (*Pachtverträge*) concluded prior to November 11, 1918, the same reasoning led to the conclusion that they "were not affected by the transfer of sovereignty, and that they remain in force unless they have expired or have been legally superseded by *Rentengutsverträge*." Moreover, the Prussian state had not been precluded from granting, prior to the passing of the territory to Poland, a *Rentengutsvertrag* to a holder of a *Pachtvertrag* granted prior to the armistice, and such a *Rentengutsvertrag* should be respected by Poland.

The Court was, therefore, of opinion that (1) the points referred to did involve international obligations of the kind referred to in the minorities treaty and so came within the League's competence as there defined; and (2) the position adopted by the Polish government was "not in conformity with its international obligations."

This opinion was duly transmitted to the Secretary-General of the League of Nations on September 15, who communicated it to the members of the League and to other states named in the Annex. It came before the Council on September 25, 1923, and the Council "invited the Polish Government to communicate to it, before the next Council session, information showing what measures the Polish Government proposes to take in order to settle the question of these colonists."⁶³ Acting on this invitation, the Polish government on December 1, 1923, addressed a letter to the Secretary-

⁶³ Document C. 637. 1923. 1.

General of the League of Nations, suggesting a "practical solution," involving a pecuniary settlement between the Polish Treasury and the dispossessed colonists, and a withdrawal of orders of expulsion against colonists in respect of whom judgments have not been carried into effect. This letter was communicated to the Council on December 8, 1923.

ACQUISITION OF POLISH NATIONALITY

The Germanic League of Bydgoszcz submitted to the Council of the League two memoranda in connection with the telegram of November 9, 1921. The second of these, dated November 12, 1921, dealt with the interpretation of certain provisions of the Polish minorities treaty of June 28, 1919. This was referred to the Council committee which dealt with the questions raised by the same petitioner with reference to German settlers in Poland, and later also to the committee of jurists who studied the latter question.⁶⁴ On December 7, 1922, the Polish Minister for Foreign Affairs stated that, as regards Article 4 of the Polish minorities treaty, the Polish government could not alter its interpretation of that article so long as the Germans gave evidence of a tendency to avail themselves of it for a totally different purpose from that of assuring individual interests. Poland also contended that Article 4 had not been placed under the guaranty of the League of Nations.⁶⁵

When the matter came before the Council on February 2, M. Askenazy informed the Council that negotiations with reference to the question were in progress at Dresden, between the German and Polish governments.⁶⁶ For this reason, the Council accepted a suggestion of M. da Gama (Brazil) that the question be adjourned pending the result of these negotiations. On July 4, 1923, the matter again came before the Council, and the Brazilian representative reported that

⁶⁴ See *League of Nations Off. Jour.*, June, 1922, pp. 555, 702; August, 1922, pp. 806, 917; and November, 1922, pp. 1181, 1297, 1300.

⁶⁵ *Ibid.*, March, 1923, p. 396.

⁶⁶ *Ibid.*

the Polish government had informed the Secretary-General on June 26 that a basis for agreement had been found at Dresden, and on this ground action was postponed. On July 6, 1923, the German government informed the Council that it did not foresee the possibility of a speedy settlement by direct negotiation. On July 7, 1923, M. de Modzelewski (Poland) withdrew his request for adjournment of the question, and asked the Council, before referring any question to the Court, to seek the views of other states bound by similar minority treaties — Czechoslovakia, Roumania, and the Serb-Croat-Slovene Kingdom. But this was not agreed to by the Council, which decided to ask the Court for an advisory opinion on the questions:

(1) Is the League of Nations competent to deal with the question of Article 4 of the treaty of June 28, 1919, between the Principal Allied and Associated Powers and Poland?

(2) If the League of Nations is competent, what is the precise interpretation of that article?

The precise text was left to the President's redaction. The Polish representative took "note of the Council's resolution," and said he would "bring it to the notice" of his government.⁶⁷ The resolution was later drafted to read as follows:⁶⁸

The Council of the League of Nations having received notice of the following question:

The Polish Government has decided to treat certain persons, who were formerly German nationals, as not having acquired Polish nationality and as continuing to possess German nationality, which exposes them in Poland to the treatment laid down for persons of non-Polish nationality, and, in particular, of German nationality:

On the one hand, on the ground that these persons were born in the territory which is now a part of Poland, their parents having been habitually resident there at the date of this birth, it is maintained that in virtue of Article 4, paragraph 1, of the treaty of June 28, 1919, between the Principal Allied and Associated Powers and Poland, they are *ipso facto* Polish

⁶⁷ See *League of Nations Off. Jour.*, August, 1923, pp. 934-935. Apparently the concurrence of the Polish representative was not necessary. See Lord Robert Cecil's remarks with reference to the expropriation by the Roumanian government of the property of Hungarian optants, *Ibid.*, p. 905.

⁶⁸ *Ibid.*, p. 999.

nationals and consequently, enjoy all the rights and guarantees granted by the provisions of the said treaty to Polish nationals belonging to racial, religious or linguistic minorities;

On the other hand, the Polish Government considers itself entitled not to recognize these persons as Polish nationals, if their parents were not habitually resident in the above-mentioned territory, both on the date of birth of the person concerned and on the date of the entry into force of the above-mentioned treaty, namely, January 10, 1920. It is, consequently, maintained that these persons cannot legally enjoy the guarantees granted by the treaty:

Requests the Permanent Court of International Justice to give its advisory opinion, if possible during the present session, on the following questions:

(1) Does the question regarding the position of the above-mentioned persons, in so far as they may belong to racial or linguistic minorities arising out of the application by Poland of Article 4 of the treaty of June 28, 1919, between the Principal Allied and Associated Powers and Poland, fall within the competence of the League of Nations under the terms of the said treaty?

(2) If so, does Article 4 of the above-mentioned treaty refer solely to the habitual residence of the parents at the date of birth of the persons concerned, or does it also require the parents to have been habitually resident at the moment when the treaty came into force?

The Secretary-General is authorized to submit this request to the Court, together with all documents concerning the question, to inform the Court of the action taken by the Council in the matter, to give all necessary assistance in the examination of the case, and, if necessary, to arrange to be represented at the Court.

The Court became seised of the question by a letter of the Secretary-General of July 11, 1923. Notice was given to all members of the League, to other states mentioned in the Annex, and to the German government.⁶⁹ The Court heard oral statements by Count Rostworowski on behalf of Poland, and by M. Schiffer on behalf of Germany. On August 25, the Court was informed of the Roumanian government's desire to be heard and September 3 was set as the date; but the time was considered by Roumania to be too short, and the

⁶⁹ Though Article 73 of the rules of court did not require that notice be sent to Germany, and though Germany might not have a *locus standi* with reference to ordinary questions arising under the Polish minorities treaty, the Court's action in sending such notice in this case would seem to have been a proper exercise of its discretion. But in its letter of December 1, 1923, addressed to the President of the Council, the Polish government seems to have objected to the Court's hearing the German government, on the ground that Germany "would not in any way be regarded as an interested party."

Court did not extend it owing to the advanced state of its session and the desire of the Council that the question be disposed of at that session.

On September 15, 1923, the Court handed down a unanimous opinion,⁷⁰ though Lord Finlay added some "observations" on one of the questions involved. The Court first expressed the opinion that the matter was within the competence of the League of Nations, denying Poland's contentions that only Polish nationals could constitute a protected minority and that Articles 3 to 6 of the minorities treaty were not included in the guaranty of the League of Nations established by Article 12. Lord Finlay concurred in these conclusions, but would have preferred "that the Court should not merely have based its answer to the Polish contention as to competency on the view that the minority contemplated by Article 12 may be one of inhabitants simply, but that it should also have pointed out that . . . the Polish case fails even if the minority were to be taken on the basis of *ressortissants*." ⁷¹

The Court then expressed the opinion that Article 4 of the Polish minorities treaty refers "only to the habitual residence of the parents at the date of birth of the persons concerned." The Polish government had contended that "of the individuals of German origin born in this territory, only those can claim Polish nationality whose parents were habitually resident there" both on January 10, 1920, and on the day of the birth of the individual. The Court thought that such an interpretation would "amount to an addition to the text," which had plainly synchronized birth and residence; that it would have the effect of depriving of Polish nationality a person born in Poland of parents habitually resident there at the time, simply because his parents were dead on January 10, 1920. The clause of the treaty "leaves little to be desired

⁷⁰ Judge Moore took part in the deliberations and concurred in the conclusions, but was forced to leave The Hague before the terms of the opinion were finally settled.

⁷¹ Advisory Opinions, Series B, No. 7, p. 26.

in the nature of clearness," and the additional condition contended for would require a reconstruction of the text.

This advisory opinion was duly transmitted to the Secretary-General of the League of Nations, who on September 18, 1923, communicated its text to all members of the League and other states mentioned in the Annex. On September 27, 1923, the Council "adopted" the advisory opinion of the Court, though M. Skirmunt (Poland) seems to have abstained from voting.⁷² At that time, also, the British government raised certain further questions about the interpretation of Article 3 of the Polish minorities treaty.

The advisory opinion relating to the German settlers in Poland and that relating to the acquisition of Polish nationality represent a constructive and judicial application of the new body of international law contained in the minorities treaties. The Court has not only taken account of the purpose and function of those treaties: it has also grasped the practical considerations which condition the success of this innovation. With a narrow and destructive attitude on the part of the Court, these treaties might have met with the same failure and miscarriage as the minority provisions in the treaty of Berlin. But there is no trace of such an attitude in these opinions. Due regard is apparent for the necessities of the governments in the new states of Eastern Europe, while at the same time the appreciation of the ends to be served by the treaty provisions is such as to build a confidence among the minority peoples who must depend on them. The opinions constitute a contribution to international law worthy of a John Marshall.

THE JAWORZINA QUESTION

The Ambassadors at Paris of Great Britain, Italy, and Japan, and the Minister of Foreign Affairs of France, acting as the "Conference of Ambassadors," decided on July 27,

⁷² See *procès-verbal* of the 26th session of the Council, *League of Nations Off. Jour.*, November, 1923, pp. 1334-1335.

1923, to request the Council of the League of Nations to suggest a solution of the Jaworzina question, relating to the delimitation of the frontier between Poland and Czechoslovakia in that part of the territory of Spisz where the Jaworzina district is situated. The question had been before the Conference of Ambassadors for many months, and in referring it to the Council, the Conference stated that it would welcome a submission of the legal question involved to the Permanent Court of International Justice. The Council began to consider the matter on September 20, 1923. Dr. Benes (Czechoslovakia) declared that "the fact that the matter was before the League of Nations would certainly appease any disquiet," but insisted on the urgent nature of the problem and asked for a reference to the Permanent Court of International Justice. M. Skirmunt (Poland) likewise agreed to such a reference. On September 27, 1923, the Council decided to ask the Court for an advisory opinion on the following question:

Is the question of the delimitation of the frontier between Poland and Czechoslovakia still open, and, if so, to what extent; or should it be considered as already settled by a definitive decision (subject to the customary procedure of marking boundaries locally, with any modifications of detail which that procedure may entail)?

The Court became seised of this matter by reason of a letter of the Secretary-General of September 29, 1923. The Court met in extraordinary session on November 12, 1923, to consider its opinion. The Polish government was represented before the Court by M. Jean Mrozowski, President of the Supreme Court of Poland, and Professor Joseph Blociszewski; Czechoslovakia by Professor Jan Kremer, and Dr. Krno. A unanimous opinion was handed down on December 6, 1923, by which the Court held that "the question of the delimitation of the frontier between Poland and Czechoslovakia has been settled by the decision of the Conference of Ambassadors of July 28, 1920, which is definitive, but that this decision must be applied in its entirety."

In the statement of the question by the Council, a summary of the main contentions of Poland and Czechoslovakia had been placed before the Court. Originally, it was decided on September 27, 1919, that a plebiscite was to be taken in the Spisz area,⁷³ but at the Spa Conference in July, 1920, this arrangement was suspended. On July 28, 1920, a frontier line dividing the district between Poland and Czechoslovakia was decided upon by the Conference of Ambassadors, subject to such modifications as might later be made on the recommendation of the delimitation commission, and was accepted by Poland and Czechoslovakia. This decision was held by the Court to have had a "final character." It was the result of what the Court compared to an "arbitration." The agreements of Poland and Czechoslovakia of July 10, 1920, and July 28, 1920, were held to have given the decision of the Conference of Ambassadors, "over and above the authority possessed by a decision of the Principal Allied and Associated Powers," the "force of a contractual obligation entered into by the parties."

The Court then proceeded to construe the effect of the decision, denying the Polish contention as to its partial character. A question arose as to the effect of interpretations put on the decision by the Conference of Ambassadors itself, some two years after the date of its formulation. The Court likened the Conference to an arbitrator in this respect, and refused to admit a modification of the clear effect of the decision by the later interpretation. Only the delimitation commission had been given power to vary the decision, and this power was still preserved to it. The undertaking of Poland and Czechoslovakia on November 6, 1921, to settle "the question of the commune of Jaworzina within a period of six months by means of a direct and friendly agreement between the two governments," had not reopened the whole question; nor had the result been effected by the decision of

⁷³ For the text of this decision, see *British and Foreign State Papers*, cxiii, 804. For the decision of the Conference of Ambassadors of July 28, 1920, see *Ibid.*, p. 860. For the Court's opinion, see *Collection of Advisory Opinions*, No. 8.

the Conference of Ambassadors of December 2, 1921, calling on the Polish and Czechoslovak governments to reach a decision by January 15, 1922, and authorizing the delimitation commission to proceed to carry out the decision of July 28, 1920, if they failed to do so.

PROPOSED REFERENCES TO THE COURT

Various questions arose during the year with reference to which proposals were made for references to the Court.

(a) *Lithuania's request.* On February 3, 1923, the Council of the League of Nations, in the course of its consideration of the Vilna dispute between Lithuania and Poland, adopted a recommendation for apportioning between the two countries the administration of the neutral zone established in the Vilna territory by the Kovno protocol of February 29, 1920.⁷⁴ The recommendation was accepted by Poland, but not by Lithuania. The Lithuanian government soon afterward requested that the Council seek the Court's opinion with reference to two questions which had arisen relating to the interpretation of the Covenant. On March 8, 1923, these questions were formulated as follows:

1. Has the Council of the League of Nations the right, when a dispute is submitted to it under paragraph 1 of Article 15 of the Covenant, to address to the parties with regard to incidental questions which have not been specifically submitted to it, recommendations having the same force as the Council's reports referred to in paragraphs 4, 6, and 7 of the same article?

2. If the recommendations of a report by the Council of the League of Nations have been adopted in the circumstances contemplated in the 6th paragraph of Article 15 of the Covenant of the League of Nations and have been accepted by one of the parties, are such recommendations binding upon the other party if it does not accept them? And, secondly, if, within the period fixed by Article 12 of the Covenant, it goes to war with a party which accepts the report, is it liable to the penalties laid down in Article 16?

On April 21, 1923, the Council considered this request of Lithuania and decided, on the proposal of M. Hymans (Bel-

⁷⁴ *League of Nations Off. Jour.*, March, 1923, p. 238. For Lithuania's request, see *Ibid.*, p. 586.

gium), not to seek the Court's opinion. The Lithuanian representative then asked that the request be put on the agenda of the next Assembly.⁷⁵ The item on the Fourth Assembly's agenda was as follows:

23. Request to the Assembly from the Lithuanian Government concerning:

(a) The Council's resolution of January 13, 1923;

(b) Reference of certain questions to the Permanent Court of International Justice for an advisory opinion.

On September 27, 1923, the Assembly decided, "according to a desire expressed by the Lithuanian delegation, to refer" the question to the Fifth Assembly.⁷⁶

(b) *Expropriation of Hungarian optants in Roumania.* This question was brought before the Council of the League of Nations by Hungary on April 20, 1923, and after a careful study M. Adatei (Japan) proposed on April 23, that the two governments be invited by the Council to enter into an agreement (*compromis*), of which he proposed a draft, referring to the Court the question whether such expropriation constituted a violation of Article 63 of the treaty of Trianon or Article 3 of the Roumanian minorities treaty, and if so, what measures should be taken by Roumania to indemnify the Hungarian nationals affected.⁷⁷ The proposal was accepted by Hungary, but declined by Roumania on the ground that, while certain legal questions were involved, the matter was much broader and included the whole Roumanian programme of agrarian reform.⁷⁸ M. Adatei then suggested that the Council ask the Court for an advisory opinion. A question arose as to whether in taking such action the unanimous

⁷⁵ *League of Nations Off. Jour.*, June, 1923, p. 670.

⁷⁶ *Ibid.*, Spec. Supp. No. 11, p. 29. The matter was studied by both the first and sixth committees. See *post*, pp. 124-125.

⁷⁷ The text of the proposed draft was published in *League of Nations Off. Jour.*, June, 1923, p. 703. On the whole matter, see *La Réforme Agraire en Roumanie et Les Optants Hongrois de Transylvanie devant la Société des Nations*, Mars-Juillet, 1923, Paris, 1924, 189 pp.

⁷⁸ See the very striking declarations of M. Titulesco (Roumania) in *League of Nations Off. Jour.*, June, 1923, pp. 606, 608.

votes of all representatives of the Council, including representatives of the disputant states, would be required. The Council finally decided that in the absence of "prospect of agreement" the question should be adjourned and M. Adatei should use every effort to secure agreement between the parties. Conversations were conducted at Brussels on May 26 and 27, under the presidency of M. Adatei, and the minutes contained declarations by both sides which offered a *modus vivendi*.⁷⁹ But on June 12, the Hungarian government declined to proceed on this basis, and requested M. Adatei to renew the proposals he had made to the Council for resort to the Court. The matter came before the Council on July 5, 1923, when Count Apponyi (Hungary) asked for a reference to the Court. M. Titulesco (Roumania) relied on the Brussels accord in declining to agree to this course. Various members of the Council asserted its power to request an advisory opinion without the concurrence of the Roumanian representative,⁸⁰ but concurred in the decision that under the special circumstances no request should be made.

(c) *Italo-Greek conflict*. The murder of the Italian members of the Greek-Albanian Boundary Delimitation Commission, on Greek soil on August 27, 1923, led to the Italian occupation of Corfu on August 30 and an appeal by Greece to the Council of the League of Nations on September 1. On September 6, M. Quinones de Leon (Spain) submitted to the Council a series of proposals drafted in collaboration with several of his colleagues. One of these proposals provided for "the submission to the Permanent Court of International Justice, for decision under the rules of summary procedure, of the question of the indemnity to be paid by Greece." While these proposals were not adopted by the Council, a record of them was transmitted to the Conference of Ambassadors at Paris, which on September 7 adopted the following decision:

⁷⁹ See the account in *League of Nations Off. Jour.*, August, 1923, p. 1012.

⁸⁰ Particularly Lord Robert Cecil (Great Britain) and M. Branting (Sweden). *Ibid.*, p. 905.

(7) The Greek Government will undertake to pay to the Italian Government, in respect of the murder of its delegates, an indemnity, of which the total amount will be determined by the Permanent Court of International Justice at The Hague, acting by summary procedure. The Court will give judgment on consideration of the report of the commission specified in paragraph 6. This report will be transmitted by the Conference of Ambassadors, with its comments, to the court of justice.

The Greek Government will deposit forthwith, as security, at the Swiss National Bank, a sum of 50,000,000 Italian lire, such deposit to be accompanied by the following instructions: "to be paid over, in whole or in part, to the Italian Government, upon the decision of the Permanent Court of International Justice at The Hague."

This decision was modified by a later decision of September 13, in which the Conference reserved to itself the decision as to Greece's fulfilment of the conditions laid down for her, and in the event of their non-fulfilment the decision as to measures to be taken which might include "the payment to Italy of a sum of fifty million Italian lire, and in that case the conference will request the Permanent Court of International Justice at The Hague to restore to Greece the security deposited by her, and no further application will be made to The Hague, as stated in paragraph 7 of the note of September 8th, unless any special application is made to the Court by Italy for charges entailed by the occupation."

On September 26, the Conference of Ambassadors decided, as a consequence of the negligence of the Greek government in pursuing the authors of the crime, to award the entire fifty million lire to Italy. The resolution requested the Court to order the Swiss National Bank to pay that sum to Italy. The money was paid, but it seems that no question was ever placed before the Court and that the Court took no action whatever.

On September 26, 1923, Lord Robert Cecil (Great Britain) proposed to the Council of the League of Nations to submit to the Permanent Court of International Justice certain questions regarding the interpretation of the Covenant, which had arisen in connection with the discussion of the Corfu incident.⁸¹ On September 22, the Council had asked a

⁸¹ *League of Nations Off. Jour.*, November, 1923, p. 1320.

committee of jurists to formulate the questions. M. Salandra (Italy) doubted the competence of the Permanent Court of International Justice, inasmuch as the questions had a political character as well as a legal character. The proposal was discussed at some length in various meetings of the Council, in the course of which it was thoroughly recognized that the Court should not be asked for opinions with regard to general questions, or, as it was put, should not be asked to write essays rather than to deal with disputes. As M. Salandra stated it, the Court is not "an academy of jurists, but a magistrature." The Council finally decided on September 28 to set up a special commission of jurists to give an opinion on the questions before it. Each member of the Council was to nominate a jurist to serve on the commission, and the Director of the Legal Section of the Secretariat was to collaborate with the persons thus nominated. This inquiry by the special commission of jurists was accepted by the Council in lieu of any reference to the Permanent Court of International Justice.

ADVISORY OPINIONS

Of the nine questions which have come before the Court in its first two years, eight have been on requests by the Council of the League of Nations for advisory opinions. This feature of the Court's jurisdiction is thus proving to have an importance perhaps greater than many persons had anticipated. Its effect on the position of the Court and on the nature of its jurisprudence may very well be given special consideration.

First of all, some difference may arise as to the nature of this function exercised by the Court. Judge Moore has said that it "obviously is not a judicial function,"⁸² though he found

⁸² *Columbia Law Review*, xxii, 507. Cf. Professor James Bradley Thayer's statement that the giving of advisory opinions "is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority." *Harr. Law Rev.*, vii, 153. And Judge Cardozo has more recently said that "the giving of such opinions is not the exercise of the judicial function." *Matter of State Industrial Commission* (1918), 224 N. Y. 13, 16. See also *Virginia Law Review*, x, 152.

[In *Building Inspector of Lowell v. Stoklosa* (Mass., 1924), 145 N. E. 262, Rugg,

that the rules adopted by the Court (Arts. 71-74) "assimilate the process as far as possible to a judicial proceeding." This view seems to have been accepted by Secretary Hughes in an address before the American Society of International Law.⁸³ Mr. Hammarskjöld thinks that "the whole idea of advisory opinions to be given by the Court is in itself a novelty."⁸⁴ The conception of advisory opinions has also led to popular misunderstanding in America.

It is to be noted that the giving of advisory opinions by a court or by judges of a court is by no means new in the Anglo-American legal system.⁸⁵ In England, the judges at one time gave opinions to the king. As late as 1760, such an opinion was given respecting the court-martial proposed to be held on Lord George Sackville.⁸⁶ These have been spoken of as "extra-judicial."⁸⁷ The House of Lords may still request the judges to give opinions,⁸⁸ though it has not frequently done so in late years. Some opinions given by the judges have had great influence in the development of the law.⁸⁹

Since 1780, the Constitution of Massachusetts has provided for advisory opinions to be given by the justices of the Supreme Judicial Court, "upon important questions of law and upon solemn occasion," at the request of either branch

C. J., has recently said that the advisory opinions of the justices in Massachusetts "express views resting upon judicial investigation and consideration."]

⁸³ *Proceedings*, 1923, p. 84.

⁸⁴ *Harv. Law Rev.*, xxxvi, 715.

⁸⁵ The fullest consideration of the subject is *Departmental Coöperation in State Governments*, by Albert R. Ellingwood (Macmillan: New York, 1918). See also Thayer, *Legal Essays*, p. 42. H. A. Dubuque, "The Duty of Judges as Constitutional Advisers," *American Law Review*, xxiv, 369 (1890).

⁸⁶ See 2 Eden (Appendix), p. 371. The judges put in a *caveat*, however, that "we should be ready, without difficulty, to change our opinion, if we see cause, upon objections that may be then laid before us, though none have occurred to us at present which we think sufficient."

⁸⁷ 126 Mass. 561 (1878).

⁸⁸ At least there is a dictum to this effect in *Attorney-General for Ontario v. Attorney-General for Canada* (1912), A. C. 571, 586. Of course, a judgment of the Judicial Committee of the Privy Council is "a statement of the reasons which determine them in 'humbly advising' the King to give effect to their decision." Anson, *Law and Custom of the Constitution*, ii, 293 (4th ed.).

⁸⁹ For instance, the opinions in *M'Naghten's Case* (1843), 10 Clark and Fennelly, 200.

of the legislature, or of the Governor and the Council.⁹⁰ Opinions are frequently given, under this provision.⁹¹ They are the "opinions of the justices," and not of the Court, though they are published in the Massachusetts reports of the opinions of the Court. It is said that the justices do not sit as a court, but as individuals.⁹² They act "without the benefit of argument," and it is not clear that briefs may be filed by interested persons. Hence *stare decisis* does not apply; and if a question upon which an opinion is given arises in later litigation, the earlier opinion is not to be relied on and the matter is to be reëxamined "with the effort carefully to guard against any influence flowing from our previous consideration."⁹³ The opinion is to be regarded as "open to reconsideration and revision; yet it imports a view resting upon judicial consideration and examination of the subject."⁹⁴ In a recent instance, the Court has rendered a decision counter to a previous opinion of the justices.⁹⁵ Of course, a previous decision might be overruled, but this is something more. If the opinion were to be regarded as the opinion of the Court, it would not be subject to *stare decisis*. It may nevertheless possess a judicial character.

In various other states, advisory opinions are given by the judges of the State Supreme Court. The Constitution of New Hampshire has provided for such opinions since 1784,⁹⁶ the Constitution of Maine since 1820,⁹⁷ and the Constitution of Rhode Island since 1842.⁹⁸ The Missouri Constitution of 1865 contained a similar provision,⁹⁹ but it was not retained in the Constitution of 1875. In Florida, the Governor has been au-

⁹⁰ Constitution of Massachusetts, Chap. III, Art. II.

⁹¹ Volume 237 of the Massachusetts reports contains five such opinions; vol. 239, two; and vol. 240, three.

⁹² Rugg, C. J., in *Loring v. Young* (1921), 239 Mass. 349, 361; 132 N. E. 65, 68.

⁹³ *Young v. Duncan* (1914), 218 Mass. 346, 351; 106 N. E. 1, 4.

⁹⁴ Rugg, C. J., in *Loring v. Young* (1921), 239 Mass. 349, 361; 132 N. E. 65, 68. See also *Perkins v. Westwood* (1917), 226 Mass. 268, 272; 115 N. E. 411.

⁹⁵ *Loring v. Young* (1921), 239 Mass. 349; 132 N. E. 65.

⁹⁶ A recent opinion may be found in (1919), 79 N. H. 535; 112 Atl. 525.

⁹⁷ A recent opinion may be found in (1921), 120 Maine, 566.

⁹⁸ A recent opinion may be found in (1922), 44 R. I. 275.

⁹⁹ See *Missouri General Statutes of 1866*, p. 36.

thorized to require the opinion of the justices on certain questions since 1868,¹⁰⁰ and in South Dakota since 1884.¹⁰¹ The Constitution of Colorado, since 1886, has imposed the duty to give advisory opinions on the Court itself, not simply on the judges; so that the Colorado Court has declared that its responses "have all the force and effect of judicial precedents."¹⁰² For this reason, doubtless, it has narrowly confined the field within which the competence will be exercised.¹⁰³

A statute in Delaware, dating from 1852, puts on the chancellor and judges a duty to give opinions to the Governor on certain questions, though few opinions seem to have been requested.¹⁰⁴ In Alabama, the legislature itself has recently provided that the Governor or either house of the legislature may obtain the opinion of the justices of the Supreme Court on constitutional questions. The statute provides however that the opinions are not to be binding, even on the justices giving the opinions, though it authorizes the justices to request briefs from the Attorney-General and to receive briefs from "other attorneys as *amicus curiae*."¹⁰⁵ The validity of this act has recently been "affirmed" by five of the seven justices.¹⁰⁶

In Oklahoma, in a criminal case where sentence of death has been imposed and where no appeal is taken, the judges of the Criminal Court of Appeals are empowered by statute to give an opinion to the Governor.¹⁰⁷ "The questions presented are: Has there been an observance of all the formalities of law essential to the taking of human life, or has the

¹⁰⁰ See (1919), 78 Florida, 156; 82 Southern, 606.

¹⁰¹ See *In re Rural Credits Law* (1917), 38 So. Dak. 635; 162 N. W. 536; *In re Opinion of the Judges* (1920), 43 So. Dak. 645; 180 N. W. 64.

¹⁰² (1889), 12 Colo. 469. But see Ellingwood, *op. cit.*, p. 189.

¹⁰³ For the limits in general, see Ellingwood, *op. cit.*, chap. 3.

¹⁰⁴ According to Ellingwood, p. 69. An opinion was recently given *In re School Code of 1919* (1919), 30 Del. 406; 108 Atlantic, 39. In this instance, the chancellor and judges received briefs and heard arguments of counsel.

¹⁰⁵ The act was approved on February 13, 1923. See *Virginia Law Review*, x, 150.

¹⁰⁶ *In re Opinions of the Justices* (1923), 96 So. 487. See, however, *Re Application of the Senate* (1865), 10 Minn. 78.

¹⁰⁷ Bunn, *Compiled Statutes of 1921*, § 2786. See *In re Blakely* (1921), 195 Pac. 146; *In re Ledbetter* (1921), 195 Pac. 149.

trial, conviction and sentence of death been in accordance with the law of the land?"

A number of Canadian courts possess jurisdiction to give advisory opinions, and the Judicial Committee of the Privy Council has decided that a statute authorizing the Governor-General in Council to request opinions of the Supreme Court of Canada was not repugnant to the British North America Act.¹⁰⁸ Lord Loreburn repudiated a suggestion that the giving of advisory opinions could deserve to be "stigmatized as subversive of the judicial function."

Is a court exercising a judicial function when the judges, acting not as individuals but as a court, give advisory opinions? What are the essential attributes of *judiciality*? It can hardly be necessary that an actual contest between public or private litigants be before the court. The importance of such a contest would seem to be the narrowing of issues and the threshing out of the questions they involve. But both of these ends may be achieved in other ways.

In passing upon the constitutionality of a statute, American courts frequently act under circumstances which render the actual contest between litigants of little significance. Thus in New Jersey a special procedure was invented for determining whether a statute had been duly enacted, and the Supreme Court held that though there was no litigation *inter partes*, there was a judicial question for which the legislature could create a special method of judicial procedure.¹⁰⁹ The appeal allowed the state in criminal cases in some jurisdictions is in essence the same kind of proceeding; it has as its object the eliciting of "an authoritative exposition of the law upon disputed questions."¹¹⁰ It would hardly be denied that this is a *judicial* proceeding.

¹⁰⁸ Attorney-General for Ontario v. Attorney-General for Canada (1912), A. C. 571. It is to be noted that Lord Finlay, then Sir Robert Finlay, K. C., now a judge of the Permanent Court of International Justice, was of counsel attacking the Statute.

¹⁰⁹ *In re Public Utility Board* (1912), 83 N. J. L. 303, 307.

¹¹⁰ *State v. Mackey* (1891), 82 Iowa, 393; *State v. Gilbert* (1908), 138 Iowa, 335.

If a legal question arises in connection with some actual problem, upon the solution of which immediate action depends, if it is put to a court by a competent authority, if it is carefully argued before the court by representatives of interests which might be affected by the answer, and if the court proceeds to deliberate upon it in a serious way and gives to the results of its deliberation the same solemn notoriety which it gives to its decisions in formal litigations *inter partes*, then the giving of such an opinion may surely be said to have the requisites of a judicial proceeding.

The advisory opinions which the Permanent Court of International Justice has given have all been *judicial* opinions in this sense. Each of them has related, first of all, to some legal question of defined limits. The Council has not sought advice in general. It has referred to the Court specific questions, all of which have involved the interpretation of treaties. Moreover, all of these questions have related to problems which have arisen in practical affairs. The first three related to the functioning of the International Labor Office.¹¹¹ The fourth related to a pending dispute between Great Britain and France; the fifth to a dispute between Finland and Russia; the sixth to the expropriation of German colonists actually begun; the seventh to the construction to be placed on a treaty in a situation demanding action under it; and the eighth to a pending boundary dispute between Poland and Czechoslovakia.

In every case, the submission has been effected by a legally competent body in a legally proper way.¹¹² In every case,

¹¹¹ It may be thought that the third question did not relate to any pending problem, however, for the Director of the International Labor Office stated that "the International Labor Organization has never considered any intervention" with reference to agricultural production. But a limited intervention in that direction had been proposed by M. Zumeta (Venezuela) at the Third International Labor Conference, so that the problem had immediate importance. See *League of Nations Off. Jour.*, August, 1922, p. 897. Moreover, the Court was thoroughly alive to the necessity of confining its opinion to a definite question relating to a specific problem. See the opinion in Series B, No. 4, p. 59.

¹¹² This is the significance of the Court's reception of the letter of the Secretary-General of the League, of October 4, 1922, relating to the Tunis-Morocco question.

briefs have been submitted. In every case, the Court has heard arguments from duly accredited agents or representatives of interests involved. Five such representatives appeared before the Court in connection with its deliberation on the first opinion requested; seven on the second; two on the third; two on the fourth; two on the fifth; two on the sixth; and two on the seventh. Under the rules of court (Art. 72), the Court requires an exact statement of the question, and (Art. 73) notice of the request for the opinion is given not only to all members of the League and other states mentioned in the Annex to the Covenant, but also to "any international organizations which are likely to be able to furnish information on the question." The object of this is quite clearly to enable interested states or organizations to apply to be heard in argument before the Court.

The announcement of each opinion takes place at a public session of the Court, where the opinion is read aloud. A copy is then sent to the Secretary-General of the League, who communicates the text to all members of the League and to all states mentioned in the Annex to the Covenant. The opinion is at once published, also, and copies are placed on sale to any individual.

Under these circumstances, it would seem clear that the Court is performing a judicial function when it gives advisory opinions to the Council of a League of fifty-four Nations. The question has achieved added importance because of recent proposals for depriving the Court of this jurisdiction.¹¹³ As to the Court's own attitude toward this function there can be no doubt since its refusal to give an opinion on the East Carelian question and its statement that "the Court, being a court of justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a court."

¹¹³ See President Harding's address of June 21, 1923, in *Amer. Jour. Int. Law*, xvii (1923), 533, 536.

LANGUAGES BEFORE THE COURT

It is provided in the Court's Statute (Art. 39) that "the official languages of the Court shall be French and English." If the parties agree that the case shall be conducted in French or in English, the judgment will be delivered in the same language; and in the absence of such agreement, the decision is to be given in both languages, the Court determining which is to be authoritative. The Court may also authorize the use of another language, at the request of the parties.¹¹⁴ All of the proceedings before the Court to date have been conducted in French or in English, except the statements made by M. Schiffer in the *Wimbledon* case and in connection with the two questions as to minorities in Poland, which were in German. All of the eight advisory opinions, and the judgment in the *Wimbledon* case, have been given in French and English. In five cases the Court has designated the French text as authoritative, and in four cases the English text.¹¹⁵

On March 29, 1923, the British government drew attention in a memorandum to the "desirability of candidates for election to the Permanent Court of International Justice having a working knowledge of both French and English."¹¹⁶ This was considered by the Council on April 17, 1923, when M. Adatei (Japan) proposed a resolution on the subject, and the Council decided to circulate the British memorandum.¹¹⁷ Later, the Spanish government drew attention to the position it had consistently maintained in favor of the employment "of languages other than French and English," and stated that "it considers that a working knowledge of English and of French should not be considered as an essential qualification for election to the Permanent Court of Inter-

¹¹⁴ See also Article 44 of the rules of court.

¹¹⁵ Yet Mr. Gregory stated in *Amer. Jour. Int. Law* (1923), xvii, 305, that "the closing announcement as to the English and French versions, 'the French text being authoritative,' sounds again for us the exotic note."

¹¹⁶ *League of Nations Off. Jour.*, June, 1923, p. 629.

¹¹⁷ *Ibid.*, p. 555.

national Justice, but that in choosing the judges, the main consideration should be their legal knowledge and high moral character, and that they should be allowed perfect freedom to acquire their knowledge when and in whatever manner they choose."¹¹⁸

PUBLICATIONS OF THE COURT

The Court has inaugurated a very excellent scheme for issuing its publications.¹¹⁹ Four series have been established. Series A will be a collection of judgments; number 1 of this series gives the judgment in the *Wimbledon* case. Series B will be a collection of advisory opinions, of which eight have now been published. In Series C, the acts and documents relating to the judgments and advisory opinions given by the Court will be published; number 1 contains the documents relating to the first three advisory opinions, and number 2 contains the documents relating to the fourth advisory opinion; number 3 contains the documents relating to the fifth, sixth, and seventh advisory opinions and the first judgment; number 4 contains the documents relating to the eighth advisory opinion. In Series D, acts and documents concerning the organization of the Court will be published; number 2, the first to appear, deals with the preparation of the rules of court and contains the minutes of meetings held during the preliminary session of the Court, from January 30 to March 24, 1922; number 3 contains extracts from international agreements affecting the jurisdiction of the Court.

The Protocol of Signature, Statute, and rules of court have not been issued in the official publications of the Court, though a convenient volume containing all of them was put out in 1922 by the Institut Intermédiaire International.¹²⁰ Nor do the publications include, as yet, the cases and counter

¹¹⁸ Document C. 479. M. 198. 1923. V.

¹¹⁹ See *Amer. Jour. Int. Law* (1923), xvii, 836. For a list of the Court's publications, see p. 373, *post*.

¹²⁰ But see Mr. Hammarskjöld's statement in *Harv. Law Rev.*, xxxvi, 725, which would indicate that this publication should be considered as number 1 of Series D.

cases and other documents filed by parties to contested cases or by governments or organizations interested in questions submitted for advisory opinions. On January 24, 1923, the Registrar addressed a letter to the Secretary-General who circulated it to all members of the League, in which the Court "expressed the wish that (a) governments filing printed documents of procedure should place at the disposal of the Court, beyond the number of copies required for the purposes of the procedure, a further number of copies printed on inexpensive paper which, with the consent of the interested governments, could be distributed to scientists and scientific organizations, together with the Court's own publications; (b) that for printed documents of procedure filed by governments with the Permanent Court of International Justice a shape and size should be adopted similar to that used by the Court for Series A and B of its publications."¹²¹

BUDGET OF THE COURT

The budget of the Court forms a separate part of the budget of the League of Nations. The budget of the League for 1922 provided 1,500,000 gold francs for the expenses of the Court. As from February 20, 1922, the President and Registrar of the Court assumed control of its funds, and the expenses for 1922 were met by the "permanent imprest system." On February 16, 1922, the President suggested an arrangement for 1923,¹²² which was considered by the Council on May 11, 1922.¹²³ On July 17, 1922, the Council resolved to propose to the Assembly that the expenses of the Court be incorporated in the general budget of the League, and that "from each contribution paid by the members of the League of Nations into the general funds, the Court shall be granted a share corresponding to the proportion which its own budget bears to that of the League of Nations, it being understood

¹²¹ Document C. 159. M. 83. 1923. V.

¹²² See *League of Nations Off. Jour.*, June, 1922, p. 565.

¹²³ *Ibid.*, pp. 520, 564.

that, when necessary, the Court may also be granted, in the same proportion, advances from the working capital fund.”¹²⁴

The Third Assembly approved a set of regulations for the financial administration of the League of Nations,¹²⁵ defining the financial autonomy of the Court, with the result, according to Mr. Hammarskjöld, that “the budget as approved by the Court need not pass through the Council but will pass direct to the Assembly for approval.”¹²⁶

In determining the budget for 1924, the Registrar submitted estimates, doubtless with the approval of the Court or its President, to the supervisory commission of the League. The latter recommended certain reductions. Thereupon, on June 23, 1923, the Court adopted a resolution, expressing the “opinion that certain of the reductions recommended by the commission in the estimates submitted by the Registrar appear to be excessive from the standpoint of the efficient working of the Court’s services.” But “having regard to the necessity of endeavoring to effect economies in every direction under the conditions at present prevailing throughout the world,” the Court adopted the budget estimates as passed by the commission, “on the understanding that the Court reserves the right, if necessary, to ask the Fourth Assembly for supplementary credits.”

The budget of the Court for 1922 was 900,000 florins, of which 709,914.27 florins were expended; for 1923, 935,625.70 florins. For 1924, 921,739.83 florins have been allowed.¹²⁷

PENSIONS FOR THE JUDGES

The Statute of the Court provides (Art. 32): “The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel

¹²⁴ *League of Nations Off. Jour.*, August, 1922, pp. 787, 829.

¹²⁵ *Records of Third Assembly*, Plenary Meetings, ii, 207. As amended by Fourth Assembly, Document C. 663. M. 266. 1923. X.

¹²⁶ *Harv. Law Rev.*, xxxvi, 724.

¹²⁷ See Document C. 668. M. 268. 1923. X.

of the Court." On January 13, 1922, the Council directed the Secretary-General to "inform the Council concerning the measures to be taken to regulate the question."¹²⁸ The Secretary-General conducted an investigation of the system of pensioning national judges in various countries, as well as the judges of the Egyptian Mixed Tribunals, and reported to the Council on July 4, 1923.¹²⁹

On July 7 the Council requested the supervisory commission to report a proposal which might be laid before the Assembly. The supervisory commission at its seventh session decided to entrust a further investigation of the question to Lord Meston (India) and Dr. Nederbragt (Netherlands).¹³⁰ Meanwhile an item on contribution to the pension fund is carried in the budget for 1924.¹³¹

ELECTION OF JUDGE PESSÔA

The death of Judge Ruy Barbosa on March 1, 1923, created a vacancy in the personnel of the Court. Judge Barbosa had been prevented by illness from attending any meeting of the Court, and had not actively participated in its work.¹³² On April 17, 1923, the Council decided that the election of his successor should be included in the agenda of the Fourth Assembly and of a meeting of the Council to be held during the session of the Assembly.¹³³ The national groups in the Permanent Court of Arbitration, belonging to members of the League or to other states mentioned in the Annex to the Covenant, were invited by the Secretary-General to make nominations, as were also additional national

¹²⁸ *League of Nations Off. Jour.*, February, 1922, p. 102.

¹²⁹ *Ibid.*, August, 1922, pp. 881, 936, 989.

¹³⁰ Document A. 43. 1923. X.

¹³¹ Document A. 4 (b) (2). 1923. X.

¹³² This and the fact that Deputy Judge Wang first sat with the Court on June 15, 1923, are the only foundation for a very surprising statement by Mr. Gregory in *Amer. Jour. Int. Law* (1923), xvii, 306, that "some of these judges after a lapse of a year have not yet appeared or functioned with the Court, yet it is understood have faithfully drawn their stipends."

¹³³ *League of Nations Off. Jour.*, June, 1923, p. 554.

groups of members of the League not represented in the Permanent Court of Arbitration.¹³⁴

Thirty-one nominees were thus named on the list placed before the Assembly and Council.¹³⁵ Thirty-eight national groups participated in the nominations, and twenty-two of them nominated M. Epitacio da Silva Pessôa, ex-President of Brazil, ex-Delegate to the Peace Conference, and ex-Judge of the Federal Tribunal. The voting took place in the Assembly and Council on September 10, 1923, and on the first ballot M. Pessôa received a majority of the votes cast in both bodies.

A notable feature of this election was the nomination made by the group representing the United States in the Permanent Court of Arbitration, Messrs. George Gray, John Bassett Moore, Elihu Root and Oscar Straus. An unfortunate incident had delayed the invitation which had been sent to this group to make nominations in connection with the original election of the judges in 1921.¹³⁶ The invitation was despatched from Geneva on June 4, 1921, being sent to the Secretary of State for transmission to the American members. But it had not been received by the latter on August 12, when a fresh invitation was sent from Geneva. The time was then very short. On September 16, 1921, the Secretary-General notified the Assembly and the Council of the receipt of the following telegram from the members of the American group:

Considering that our appointment by the President as members of the Permanent Court of Arbitration was, under the Hague Convention of 1907, to perform the functions contemplated in that convention and that your invitation to nominate candidates for judges of the new Permanent Court of International Justice is under another treaty to which the United States is not a party, and in respect of which no authority has been conferred upon us, we reluctantly reached the conclusion that we were not

¹³⁴ In accordance with Article 4, paragraph 2, of the Court's statute.

¹³⁵ Two nominees, MM. Alvarez (Chile) and Politis (Greece), declined the candidacy.

¹³⁶ See Raymond B. Fosdick, "Secretary Hughes and the League of Nations," p. 9, reprinted from the *New York Times* of October 19, 1924.

entitled to make official nominations for the new Court. We exceedingly regret that the announcement of this conclusion has been unavoidably delayed.¹³⁷

But this position was reversed in 1923, when the American group nominated M. Pessôa, acting under the same treaty on which they had previously based their incompetence.

CHAMBER FOR SUMMARY PROCEDURE

The Chamber for Summary Procedure is formed annually according to the Statute (Art. 29), and the tenure begins on January 1, according to the rules of court (Art. 14). For 1922, the members were Judges Loder, Weiss and Huber, with Lord Finlay and Judge Anzilotti as substitutes; for 1923, the members were Judges Loder, Weiss and Moore, with Lord Finlay and Judge Altamira as substitutes. On September 15, the Registrar announced that the chamber for 1924 would consist of Judges Loder, Weiss and Huber, with Lord Finlay and Judge Altamira as substitutes.¹³⁸

RECEPTION OF THE COURT

The support of the Court is being extended continually. On May 15, 1923, forty-six states or members of the League had signed the protocol of signature.¹³⁹ On August 1, 1923, the protocol was signed by a forty-seventh state, Hungary.¹⁴⁰ Thirty-five states or members of the League had ratified the protocol of signature on May 15, 1923, and a thirty-sixth, Latvia, has since ratified. On that date, also, twenty states

¹³⁷ See Document A. 92. 1921. V.

In an address before the American Society of International Law, on April 26, 1923, Mr. Root stated that "the members of the American group, however, other than Mr. Moore, did not hesitate to express their unanimous personal opinion that the wisest possible choice among the citizens of the United States for membership in the Court would be Mr. Moore himself." How this opinion was expressed, and to whom, is not disclosed by any documents available to the writer.

¹³⁸ Document C. 623. M. 234. 1923. V.

¹³⁹ See publications of the Court, Series D, No. 3, pp. 12 ff. See also the League of Nations, *Treaty Series*, vi, 379; xi, 404.

¹⁴⁰ See Document A. 10 (a). Annex 1923, entitled "Progress of International Conventions and Engagements."

had accepted the optional clause providing for compulsory jurisdiction, but it has since been accepted by a twenty-first state, Latvia.¹⁴¹

In addition to this formal action on the constitutive instruments of the Court itself, the prestige of the Court is being increased continually by accretions to its jurisdiction by reason of references in various treaties and conventions. The volume recently published by the Court¹⁴² indicates the extent of such references up until May 15, 1923. Since that date, numerous international treaties and engagements have mentioned the Court. Among these are the Latvian minorities declaration to the Council of the League on July 27, 1923,¹⁴³ the resolution of the Council of the League of Nations relating to the protection of minorities in Esthonia, of September 17, 1923;¹⁴⁴ the convention for the suppression of the circulation of and traffic in obscene publications, September 12, 1923;¹⁴⁵ and the convention relating to the simplification of customs formalities, of November 3, 1923.¹⁴⁶

The professional comment on the establishment of the Court, and on its work, continues to be almost uniformly favorable.¹⁴⁷

¹⁴¹ Document C. 624. M. 235. 1923. V. For up-to-date lists of signatures and ratifications of the protocol of signature and the optional clause, see Appendices G and I, *post*, pp. 334, 339.

¹⁴² Series D, No. 3, entitled "Extracts from International Agreements affecting the Jurisdiction of the Court." [A second edition, Series D, No. 4, was published on June 1st, 1924.] See also the writer's article in *Amer. Jour. Int. Law* (1923), xvii, 24, and Professor Blociszewski's article in the *Revue Générale de Droit International Public*, 1922, p. 23.

¹⁴³ *League of Nations Off. Jour.*, August, 1923, p. 933.

¹⁴⁴ Minutes of Council, 26th session, P. V. 13, p. 21.

¹⁴⁵ Document C. 630. M. 236. 1923. IV.

¹⁴⁶ Document C. D. I. 96 (1) 1923.

¹⁴⁷ See *Cambridge Law Journal*, i, 29; Ernest Lémonon in *Journal du Droit International (Clunet)*, xlix, 761; *Boston University Law Review*, i, 6; Gabriele Salvioli in *Rivista di Diritto Internazionale*, April, 1923, p. 11; *American Bar Assn. Journal*, ix, 160; W. L. Frierson in *Maryland State Bar Assn. Report for 1922*, p. 74; Charles H. Carey in *Oregon Law Review*, ii, 205. See also Judge de Bustamante's interesting paper in *Revista de Derecho Internacional*, iv, 5. For a partial bibliography, see the *Advocate of Peace*, December, 1923, p. 438.

THE UNITED STATES AND THE COURT

Aside from the individual participation of Mr. Elihu Root and Dr. James Brown Scott in the work of the Committee of Jurists which framed the Statute of the Court, the United States had no part in establishing it. On July 13, 1922, Secretary Hughes stated that he saw "no prospect for any treaty or convention by which we should share in the maintenance of the Court until some provision is made by which, without membership in the League, this Government would be able to have an appropriate voice in the election of the judges."¹⁴⁸ On October 30, 1922, he expressed his belief "that suitable arrangements can be made for the participation by this Government in the election of judges of the international court which has been set up, so that this Government may give its formal support to this Court as an independent tribunal of international justice."¹⁴⁹

On February 17, 1923, Secretary Hughes addressed a letter to the President, recommending that the Senate be asked for its advice and consent to the adhesion on the part of the United States to the protocol of December 16, 1920, on four conditions and understandings.¹⁵⁰ President Harding acted in accordance with this recommendation on February 24, 1923, transmitting a copy of Secretary Hughes's letter. The Senate referred the matter to the Committee on Foreign Relations, which requested further information. On March 2, 1923, the President furnished such information, transmitting Secretary Hughes's letter of March 1.¹⁵¹ No definitive action was taken by the Senate before its adjournment on March 4, however. In an address at St. Louis, on June 21, 1923,¹⁵² President Harding seems to have modified his

¹⁴⁸ *New York Times*, July 15, 1922, p. 1.

¹⁴⁹ *Ibid.*, October 31, 1922, p. 4.

¹⁵⁰ Senate Document No. 309, 67th Congress, 4th session; Congressional Record, vol. 64, 4508. Reprinted in *Amer. Jour. Int. Law* (1923), xvii, 332.

¹⁵¹ Senate Document No. 342, 67th Congress, 4th session. Reprinted in *Ibid.*, p. 339.

¹⁵² Reprinted in *Ibid.*, p. 533. Cf. comment by Mr. George A. Finch, *Ibid.*, p. 521.

own views in some degree. In his message of December 6, 1923, President Coolidge commended President Harding's February proposal "to the favorable consideration of the Senate."¹⁵³

During the later months of 1923, the United States has renewed arbitration treaties with Great Britain (June 23), France (July 19), Japan (August 23), Portugal (September 5), and Norway (November 26). "At the time of the signing of the agreement [in each case] notes were exchanged to the effect that in case the Senate shall give its assent to the President's proposal for the participation by the United States in the support of the Permanent Court of International Justice, the two governments will consider the making of an agreement under which the disputes, of the nature described in the treaty, could be referred to the Permanent Court of International Justice."¹⁵⁴

In his letter of February 17, 1923, Secretary Hughes proposed certain "conditions and understandings" on which the American adhesion should be based, and he stated that "the attitude of this Government will thus be defined and communicated to the other signatory Powers whose acquiescence in the stated conditions will be necessary." It was clearly Mr. Hughes's view that such acquiescence would be a sufficient acceptance of the American conditions and understandings, and that no amendment of the formal documents creating the Court would be necessary. A juridical basis for this view had been previously outlined by the writer,¹⁵⁵ and the view seems to have been generally accepted in the United States.

But Mr. Hughes's proposal does not seem to have been understood by some writers in other countries. Professor Eugène Borel has recently published an article in which he states that what is required is a "revision of the Covenant

¹⁵³ Congressional Record, 68th Congress, vol. 65, p. 98.

¹⁵⁴ *Communiqués* issued by the Department of State. See also U. S. Treaty Series, No. 674.

¹⁵⁵ In an article in *Foreign Affairs*, December 15, 1922, pp. 80-81.

aiming to permit the Assembly and Council to associate with themselves, by a concurrent vote and for a special and expressly determined question, the delegation of a state which, without forming a part of the League, would nevertheless be invited by this vote to act as a collaborator in the matter in question."¹⁵⁶ But he does not appear to have taken account in any way of Mr. Hughes's suggestion as to "acquiescence."

A more recent and better-considered comment on the method by which American adhesion might be effected is that of Dr. Hans Wehberg,¹⁵⁷ who finds that while Mr. Hughes's first, third and fourth conditions involve no modification of the Court Statute, his second condition as to the election of judges involves the kind of change which ought not to be made in a treaty without formal revision. Dr. Wehberg therefore suggests that the Assembly of the League undertake a revision of the Court Statute. But he has not analyzed the arguments for the sufficiency of the acquiescence alone, and those arguments seem quite irrefutable. Certainly it is desirable, if possible, to avoid the cumbersome process of amending the Statute of the Court, which would doubtless require affirmative action by each of the signatories to the protocol.

CONCLUSION

The Permanent Court of International Justice has made a promising start on its career. In two years, it has handed down nine opinions, all relating to difficult problems which involved vexed questions of international law and threatened to disturb international understanding. In each case, the Court's opinion has met with general satisfaction. In each case the states concerned have at once set about to act upon the Court's pronouncement of the law. On the administrative side, the Court has made steady progress toward in-

¹⁵⁶ *Amer. Jour. Int. Law* (1923), xvii, 429, 436.

¹⁵⁷ "L'Amérique et la Cour Permanente de Justice Internationale," *Revue de Droit International et de Législation Comparée*, 3d series, iv, 179.

creasing its efficiency and smoothing out its difficulties. The influence of the Court has been steadily growing. With forty-seven signatories to the protocol under which it exists, with lawyers everywhere viewing its record with satisfaction and hope, the Court promises a fulfilment of the world's long-cherished desire.

The American delegation to the Hague Peace Conference of 1907 reported, "A little time, a little patience, and the great work is accomplished."¹⁵³ The prophecy approaches fulfilment.

¹⁵³ James Brown Scott, *Instructions to the American Delegates to the Hague Peace Conferences, and their Official Reports*, p. 135.

IV

THE THIRD YEAR OF THE COURT¹

AS the Permanent Court of International Justice completes the third year of its activities, its rôle in the international life of our time and the prospect for its cumulating contribution to international law begin to stand out more clearly. During 1920, while its Statute was being drafted, the general conception as to its functions was more or less nebulous. In 1921, while the protocol promulgating the Statute was being ratified, and while the judges were being chosen, doubts were still being entertained as to the need for the Court and the opportunities which would be permitted to it.² In 1922, the organization of the Court, the promulgation of the rules of procedure and the handing down of three advisory opinions served to beget confidence.³ The year 1923 was such a busy one for the Court, and the satisfaction with its five advisory opinions and its judgment in the Wimbledon Case was so general that lawyers began to foresee great activities in store for it, and foreign offices began to count its existence a factor in current international affairs.⁴

Its work during 1924 — a second judgment on the Mavrommatis Palestine Concessions, a third judgment on the interpretation of paragraph 4 of the annex to Article 179 of the Treaty of Neuilly, and a ninth advisory opinion on the question of the Monastery of Saint-Naoum — constitutes new basis for the confidence of the legal profession in various

¹ Reprinted from the *Amer. Jour. Int. Law*, January, 1925, vol. xix.

² See Manley O. Hudson, "The Permanent Court of International Justice," *Harv. Law Rev.*, xxxv, 245 (January, 1922).

³ See *Id.*, "The First Year of the Permanent Court of International Justice," *Amer. Jour. Int. Law*, xvii, 15 (January, 1923); Å. Hammarskjöld, "The Early Work of the Permanent Court of International Justice," *Harv. Law Rev.*, xxxvi, 704 (April, 1923).

⁴ See Manley O. Hudson, "The Second Year of the Permanent Court of International Justice," *Amer. Jour. Int. Law*, xviii, 1 (January, 1924).

countries and builds new expectations of the court's serviceability in the peaceful settlement of international disputes.

THE MAVROMMATIS PALESTINE CONCESSIONS

The Court began its fifth session on June 16, 1924, with all the judges present, and with Judge Pessôa sitting for the first time.⁵ The Court was seised of an application by the government of the Greek Republic, filed with the registrar on May 13, 1924, instituting proceedings with reference to alleged concessions in Palestine which a Greek subject, M. Mavrommatis, had obtained, or was on the point of obtaining, from competent Ottoman authorities prior to the outbreak of war in 1914. The "request" set forth an outline of facts on the basis of which judgment was sought, "that the Government of Palestine and consequently also the Government of His Britannic Majesty" had "wrongfully refused to recognize to their full extent the rights acquired by M. Mavrommatis," and that the government of His Britannic Majesty should "make reparation for the consequent loss incurred," estimated at £234,339. On May 23, 1924, the Greek government had submitted a case, in which the original prayer was somewhat modified and claims concerning irrigation works in the Jordan Valley were abandoned. During May, the original application and the Greek case were both communicated to the British government, which on June 3 informed the Court that it would make objection that the Court had no jurisdiction to entertain the proceeding. The President of the Court set June 16 as the time for filing such objection, and on that date the agent of the British government filed both the preliminary objection and a preliminary counter-case. The objection and the counter-case concluded with a prayer that the proceeding instituted by the Greek government be dismissed.

⁵ Eptacio da Silva Pessôa, born in 1865, was elected judge on September 10, 1923. He was formerly President of the United States of Brazil and had served as a judge of the Federal Tribunal of Brazil.

On June 30, 1924, the Greek agent filed a reply to the British preliminary counter-case, asking that the objection to the jurisdiction be dismissed and that the suit be reserved for judgment on the merits. Various documents were submitted to the Court as annexes to the case and preliminary counter-case, and on July 15 and 16, oral arguments were addressed to the Court by M. Politis as counsel for the Greek government and by Sir Cecil Hurst, K.C.B., K.C., as agent for the British government. Under Article 31 of the Statute, M. Caloyanni sat as a national judge, since the Court otherwise included no judge of Greek nationality. The judgment, announced on August 30, 1924, was by a divided Court, five of twelve judges dissenting and each delivering a separate opinion in exercise of the privilege accorded by Article 57 of the Statute.⁶

The judgment deals only with the preliminary question of jurisdiction, which depended not only on the nature and subject of the dispute, but also on the conditions under which the Court was asked to exercise it. It was not denied that Article 40 of the Court Statute and Article 35 of the rules of court had been complied with. The Greek government had relied on Article 26 of the Mandate for Palestine conferred on His Britannic Majesty on July 24, 1922, which reads: ⁷

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

Such disputes were admitted to fall within the category of "matters specially provided for in treaties and conventions in force," which by Article 36 of the Statute the jurisdiction of the Court is made to comprise. But the Court had to decide whether the case of the Mavrommatis concessions as presented involved a dispute "relating to the interpretation

⁶ The judgment and the various dissenting opinions are published in the Publications of the Court, Series A, No. 2.

⁷ *League of Nations Off. Jour.*, August, 1922, p. 1012.

or the application of the provisions of the Mandate," and whether such dispute was one which could not be settled by negotiation.

The alleged Mavrommatis concessions relate to public utilities in Palestine, and antedate the present mandatory régime there. A first group relate to the construction and operation of electric tramways and to the supply of electric light and power and of drinking water in the city of Jerusalem; they depend on agreements with the Turkish authorities signed on January 27, 1914, under which securities had been deposited in March, 1914, and plans submitted in August, 1914. A second group relate to the construction and operation of electric tramways and the supply of electric light and power and of drinking water in the city of Jaffa, as well as to the irrigation of the gardens of Jaffa from the waters of El-Hodja; they depend on agreements dated January 27, 1914, under which security had been deposited and a survey made, and which were converted into concessions duly signed on January 28, 1916, but never confirmed as required by Ottoman law. A third group relate to the irrigation of the Jordan Valley, but claims based on these concessions were abandoned.

The first question before the Court was as to the existence of any dispute. The suit itself could hardly evidence the existence of a dispute, though certain passages in the judgment would seem to lead to that conclusion; in this respect the Court was careful to distinguish its advisory opinion in the Tunis-Morocco case in 1923. The disagreement as to the concessions had been first between M. Mavrommatis and Great Britain; but when the Greek government took up the case, asserting "its right to ensure, in the person of its subjects, respect for the rules of international law," it became a dispute between the mandatory and another member of the League of Nations. In the second place, it had to be found that this dispute was one that "cannot be settled by negotiation." M. Mavrommatis had begun negotiating with the

Palestine or British authorities, and the negotiations had been continued along the same lines by the Greek government, apparently in such a way as to render it superfluous to renew "discussion of the opposing contentions in which the dispute originated." The subject matter had thus been clearly defined and the majority did not doubt the "official character" of the correspondence which passed. But Lord Finlay was unable to find that any efforts had been made by the Greek government to settle the dispute.⁸ Judge Oda found that "there was only a single exchange of views between the [British] Foreign Office and the Greek Legation in London."⁹ And Judge Pessôa, while admitting that "international law lays down no protocol or formulae for *negotiations*," found in this case "a complete absence of negotiations."¹⁰

It was a more difficult task to say whether the dispute related "to the interpretation or the application of the provisions of the Mandate." The Court was unwilling to content itself with a "provisional conclusion." It proceeded to examine Article 11 of the Mandate, on which the Greek government had relied, which gives the administration of Palestine, "subject to any international obligations accepted by the Mandatory," full "power to provide for public ownership or control of any of the natural resources of the country or of the public works." The French and English texts being slightly at variance, the Court adopted the "more limited interpretation which can be made to harmonize with both versions."¹¹ While the Mavrommatis concessions themselves are outside the scope of Article 11, the Court felt called upon to say whether certain Rutenberg concessions, which the Greek government thought to cover works included in the Mavrommatis concessions, had violated the Mandatory's international obligations of which Greece could claim advantage. These obligations were thought to include those

⁸ See the judgment, p. 41.

⁹ *Ibid.*, p. 85.

¹⁰ *Ibid.*, p. 91.

¹¹ *Ibid.*, p. 19.

arising out of Protocol XII of the Lausanne Treaty. This protocol was intended to maintain concessionary contracts concluded before October 29, 1914.¹² Since the Jerusalem concessions of Mavrommatis antedated that time, they "must therefore be dealt with in accordance with the terms of Protocol XII"; and as the parties do not agree about applying to them the provisions of Article 4 and Article 6 of that Protocol, Article 11 of the Mandate must be interpreted, and consequently the Court has jurisdiction under Article 26 of the Mandate. On the other hand, the Jaffa concessions were really subsequent to October 29, 1914, and hence the same reasoning does not apply to them. The parties could not agree as to the application of Protocol XII to such later-dated concessions, and the Court was zealous to see that it should not be drawn into settling that question, inasmuch as the Protocol itself conferred no such jurisdiction. It was therefore concluded that the Court had jurisdiction over the disputes as to the Jerusalem concessions which called for an application of Article 11 of the Mandate, but that it had no jurisdiction over the dispute as to the Jaffa concessions, which were in no way connected with that article.

The Court then inquired whether its jurisdiction had been limited by any "international instrument which might overrule the provisions of the Mandate." It was found that, subject to slight modifications, Protocol XII of Lausanne had not had that effect, nor was its result affected by the fact that the Treaty of Lausanne (as well as the Protocol) had come into effect only on August 6, 1924, after the present suit was begun. Finally, the Court upheld the preliminary objection to its jurisdiction in so far as it related to the claim in respect of the works of Jaffa and dismissed the objection in so far as it related to the claim in respect of the works at Jerusalem. The latter part of the suit was then reserved for judgment on the merits, and the President was directed to

¹² The text of the protocol is printed in the British *Parliamentary Papers, Treaty Series*, No. 16 (1923), Cmd. 1929, pp. 203-211.

fix the time for deposit of further documents. January 1, 1925, was later fixed as that date.

QUESTION OF THE MONASTERY OF SAINT-NAOUM

At the close of the second Balkan War in 1912, Albania was created an independent state by action of the Powers. The Treaty of London, of May 17/30, 1913, reserved to the Powers the "task of settling the frontiers of Albania and any other question regarding Albania."¹³ This task was partly discharged by the "Protocol of London," adopted by the Conference of Ambassadors in London in 1913, acting under which, a delimitation commission drew up a protocol at Florence on December 17, 1913.¹⁴ The War prevented a complete settlement of Albania's frontiers, however, and the Peace Conference of 1919 took competence with regard to them.

When Albania was admitted into the League of Nations in 1920, reservation was made as to the settlement of her frontiers. Albania soon petitioned the Council of the League of Nations; but the Second Assembly, on October 2, 1921, by a resolution in which Albania, Greece, and the Serb-Croat-Slovene state concurred, left the task of finally settling her boundaries to the Principal Allied Powers and recommended that Albania accept their decision. A commission of enquiry sent to Albania by the Council of the League reported difficulties on the Albanian frontier in the vicinity of the Monastery of Saint-Naoum. Later, a Delimitation Commission, created under a decision of the Conference of Ambassadors of November 9, 1921, encountered the same difficulties, and they were then drawn to the attention of the Conference of Ambassadors by the British government. On November 5, 1922, each member of the Delimitation Commission transmitted his opinion to the Conference, on request; and on December

¹³ *British and Foreign State Papers*, cvii, 656; Martens, *Nouveau Recueil Général*, 3d series, viii, 16.

¹⁴ The texts of these two protocols are not readily available.

6, 1922, the Conference allotted the Monastery of Saint-Naoum to Albania. Five months later, the Serb-Croat-Slovene government sought a revision of this decision, and considerable discussion failed to allay divergences of opinion which prevailed.

Finally, on June 5, 1924, the Conference of Ambassadors at Paris decided to submit to the Council of the League of Nations the following questions:

Have the Principal Allied Powers, by the decision of the Conference of Ambassadors of December 6th, 1922, completely fulfilled in the matter of the Serbo-Albanian frontier at the Monastery of Saint-Naoum the mission which, as stated by the Assembly of the League of Nations on October 2nd, 1921, it was incumbent upon them to undertake?

Should the League of Nations consider that the Conference has not completely fulfilled its mission, what solution should be adopted as regards the question of the Serbo-Albanian frontier at Saint-Naoum? ¹⁵

On June 17, 1924, this matter came before the Council of the League, which decided to request an advisory opinion of the Court on the following question:

Have the Principal Allied Powers, by the decision of the Conference of Ambassadors of December 6th, 1922, exhausted, in regard to the frontier between Albania and the Kingdom of the Serbs, Croats and Slovenes at the Monastery of Saint-Naoum, the mission, such as it has been recognized by the interested parties, which is contemplated by a unanimous Resolution of the Assembly of the League of Nations of October 2nd, 1921? ¹⁶

The request was at once communicated by the Registrar of the Court to all members of the League, and to the United States of America, Ecuador, and the Hedjaz as states named in the Annex to the Covenant.

Various documents were thereafter supplied to the Court by the Conference of Ambassadors and the Secretary-General of the League, and the Albanian and Serb-Croat-Slovene governments submitted memoranda. At a public sitting on July 23, 1924, the Court heard oral arguments by M. Spal-

¹⁵ *League of Nations Off. Jour.*, July, 1924, p. 1007. See League of Nations Document C. 293. M. 94. 1924. VII. for a history of the question before the Conference of Ambassadors.

¹⁶ *League of Nations Off. Jour.*, July, 1924, p. 920.

aikovitch on behalf of the Serb-Croat-Slovene government, by Professor Gilbert Gidel on behalf of the Albanian government, and by M. Kapsembelis on behalf of the Greek government.

On September 4, 1924, the Court announced its opinion,¹⁷ in which the judges were unanimous, answering the question put in the affirmative, and saying that the Principal Allied Powers had exhausted their mission. It was pointed out that the decision of the Conference of Ambassadors of November 9, 1921, had been acquiesced in at the time, both by Albania and by the Serb-Croat-Slovene Kingdom. The Court refers to its advisory opinion concerning the question of Jaworzina as having determined the legal nature of such a decision.¹⁸

Prior to the decision of December 6, 1922, allotting the Saint-Naoum Monastery to Albania, Great Britain had drawn attention to the fact that the Protocol of London of 1913, as modified on November 9, 1921, was ambiguous. It was there specified that the western and southern shore of Lake Ochrida, from the village of Lim to the Monastery of Saint-Naoum, should form part of Albania. As this did not state whether the Monastery itself was to form part of Albania, the Conference of Ambassadors felt called upon to decide the question, and its decision of December 6, 1922, was carefully explained at the time. But the Serb-Croat-Slovene State protested that the mandate of the Conference was limited to settling the frontiers of Albania in conformity with the Protocol of London of 1913. In the opinion of the Court, this question is "indissolubly connected" with the question whether the line had been actually fixed in 1913. The League of Nations Enquiry Commission, the Albanian Delimitation Commission, and the Conference of Ambassadors had all decided that the Albanian frontier at Saint-

¹⁷ *Publications of the Court*, Series B, No. 9.

¹⁸ This is refutation of a popular misconception that Article 59 of the Court's Statute forbids the citation of the Court's opinions as precedents. Of course, that article merely adopts the continental European attitude toward *res judicata*. See the writer's explanation in *Harv. Law Rev.*, xxxv, 256, and the explanation by Judge de Bustamante in *Revista de Derecho Internacional*, iv, 40 (September, 1923).

Naoum had not been fixed in 1913; and the Court was of the opinion that materials before it did not suffice to prove that the view of the Conference had been erroneous. The whole history of the 1913 negotiations is reviewed, and the Court is unable to say that the word *jusqu'à* involves either inclusion or exclusion. The Serb-Croat-Slovene State contended that the Conference of Ambassadors at London in 1913 had adopted the principle that "all disputed areas on the borders of Albania and Serbia containing Christian orthodox sanctuaries of national or historical importance, which during the Balkan wars had been redeemed from Mussulman domination, should be allocated to Serbia." But the Court did not find any evidence of the adoption of such a principle. Nor did the Court find that any new facts had been unearthed which would prove essential error in the decision of December 6, 1922.

The advisory opinion was read in open Court on September 4, 1924, as is the custom, and thereafter a copy was communicated to the Council of the League of Nations. On October 3, 1924, the Council decided to communicate the opinion to the Conference of Ambassadors at Paris.

INTERPRETATION OF THE TREATY OF NEUILLY

This is the first case to come before the Court's Chamber of Summary Procedure. Article 29 of the Court's Statute provides:

With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

The procedure in the Chamber, as governed by Articles 69 and 70 of the rules of court, does not vary greatly from that of the Court itself.

On March 18, 1924, the Bulgarian and Greek governments signed at Sofia a *compromis d'arbitrage*, agreeing to submit to the Court, in its Chamber of Summary Procedure, a dispute that had arisen with regard to the powers and duties of the

arbitrator appointed by M. Gustave Ador, in virtue of paragraph 4 of the Annex to Section IV of Part IX of the Treaty of Peace signed at Neuilly on November 27, 1919. Article 2 of the *compromis* provides:

The Court will have to determine the precise meaning of the last sentence of the first sub-paragraph of paragraph 4 of the Annex to Section IV, Part IX of the above-mentioned Treaty, replying, in particular, to the two following questions:

(1) Does the text above-quoted authorize claims for acts committed even outside Bulgarian territory as constituted before October 11th, 1915, in particular in districts occupied by Bulgaria after her entry into the war?

(2) Does the text above-quoted authorize claims for damage incurred by claimants, not only as regards their property, rights and interests, but also as regards their person, arising out of ill-treatment, deportation, internment or other similar acts?

The ratifications of the *compromis* were exchanged at Sofia on May 29, 1924, and on June 2, 1924, the Greek Minister at The Hague communicated a copy of the *compromis* to the Registrar of the Court; but it was not until June 23, 1924, that the Court was informed of the exchange of ratifications. July 6, 1924, was originally fixed as the date for filing the cases, but they were not filed, in fact, until July 31, 1924. The parties jointly requested that permission be given to them to file replies; and this permission having been granted by the Court under Article 32 of its rules, the replies were filed on August 25, 1924. The Chamber was composed of President Loder, Vice-President Weiss, and Judge Huber, and their unanimous judgment was announced on September 12, 1924.

The Annex following Article 179 of the Treaty of Neuilly provides, paragraph 4:¹⁹

All property, rights and interests of Bulgarian nationals within the territory of any Allied or Associated Power, and the net proceeds of their sale, liquidation, or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect

¹⁹ *British and Foreign State Papers*, cxii, 844-845. Only the French text is authoritative. M. Gustave Ador appointed M. Albert Wuarin as arbitrator. For a collection of the documents relating to this judgment, see *Publications of the Court*, Series C, No. 6.

of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in Bulgarian territory, or debts owing to them by Bulgarian nationals, and with payment of claims growing out of acts committed by the Bulgarian government or by any Bulgarian authorities since the 11th October, 1915, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by M. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

M. Ador had appointed the arbitrator who had prepared rules for his procedure. In commenting on these rules, the Bulgarian government had denied the arbitrator's competence with respect to "acts committed" outside Bulgarian territory and in the case of acts causing personal injury to claimants. The Court was of opinion that the expression "acts committed" contains "nothing indicating that it only refers to the property, as opposed to the person, of the claimants, or to Bulgarian national territory as opposed to districts occupied by Bulgaria." It "contemplates acts contrary to the law of nations and involving an obligation to make reparation." The decision was that the paragraph should be interpreted "as authorizing claims in respect of acts committed even outside Bulgarian territory as constituted before October 11th, 1915, and in respect of damage incurred by claimants not only as regards their property, rights and interests but also as regards their person." But it was held that reparation due on such claims is included in the total capital sum limit mentioned in Articles 121 and 122 of the Treaty of Neuilly.

APPOINTMENT OF TURKISH LEGAL ADVISERS

One of the declarations (XI) signed at Lausanne on July 24, 1923, contains the following provision (paragraph 1):

The Turkish government proposes to take immediately into its service, for such period as it may consider necessary, not being less than five years, a number of European legal counsellors whom it will select from a list prepared by the Permanent Court of International Justice of The Hague from among jurists nationals of countries which did not take part in the war of 1914-1918, and who will be engaged as Turkish officials.²⁰

The declaration proceeds to define the place of such counsellors in the Turkish judicial organization.

In accordance with this provision, on October 26, 1923, General Ismet Pasha requested the President of the Court to draw up a list of candidates. The Court accepted this responsibility,²¹ and the highest legal authorities of Denmark, the Netherlands, Norway, Spain, Sweden, and Switzerland were asked to communicate, before January 1, 1924, the names of two qualified nationals. These authorities all replied, but some nominations were conditioned on the terms of appointment. These terms have now been made clear, and the forwarding of the final list should be effected soon.

ELECTION OF OFFICERS

The Statute of the Court (Art. 21) provides that "the Court shall elect its President and Vice-President for three years." Similarly, the special chambers for labor cases, and for transit and communications cases, are to be appointed every three years, while the special chamber for summary cases is "formed annually." The first election was held in February, 1922, and the terms of President Loder and Vice-President Weiss, who were elected at that time, will expire on December 31, 1924. In accordance with Article 9 of the rules of court, the elections for the ensuing term were held on September 4, 1924. Judge Max Huber was elected

²⁰ Treaty of Peace with Turkey and Other Instruments, *British Treaty Series*, No. 16 (1923), Cmd. 1929, p. 201. The original was in French. For the minutes of the Commission on the Régime of Foreigners at the Lausanne Conference, see *British Parl. Papers*, Turkey No. 1 (1923), Cmd. 1814, pp. 465-535.

²¹ Miss Frances Kellor, in a recent work entitled *Security Against War*, ii, 460, criticizes this action as intervention "in the local affairs of a state" over which the Court "has no judicial control." Her comment seems to neglect the fact that the Court was entirely free to accept or decline this responsibility.

President, and Judge Weiss was again elected Vice-President. The new Chamber for Labor Cases will be composed of Lord Finlay and Judges de Bustamante, Altamira, Anzilotti, and Huber, with Judges Moore and Nyholm as substitutes. The new Chamber for Transit and Communications Cases will be composed of Judges Weiss, Nyholm, Moore, Oda, and Pessôa, with Judges Anzilotti and Huber as substitutes. For the year 1925, the Chamber of Summary Procedure will be composed of Judges Loder, Weiss, and Huber, with Lord Finlay and Judge Altamira as substitutes.

BUDGET OF THE COURT

The expenditures of the Court during 1923 totalled 745,-990.54 Dutch florins out of an allowance of 935,625.70 florins. The new budget for 1925 contains estimates totalling 915,-796.76 florins.²²

On February 12, 1924, the Secretary-General of the League of Nations and the Committee of Directors of the Carnegie Foundation approved an arrangement concerning the continued installation of the Court at the Peace Palace. This arrangement succeeds an earlier agreement of November 15/29, 1921.²³

PENSIONS FOR THE JUDGES

Since July 7, 1923, the Supervisory Commission of the League of Nations has been entrusted with the task of framing a definite proposal which the Council might lay before the Assembly in execution of the last paragraph of Article 32 of the Court Statute which provides:

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

On August 11, 1924, the Supervisory Commission (composed of M. Osusky (Czechoslovakia), Lord Meston of Agra (India), Dr. Nederbragt (Netherlands), M. Réveillaud

²² Document A. 2 (b). (2). 1924. X.

²³ *Ibid.*, p. 8.

(France), M. Waddington (Chile) submitted a report to the Council, with draft regulations governing the grant of pensions.²⁴ This report eventually came before the fourth committee of the Fifth Assembly, which set up a sub-commission to deal with the matter, composed of Mr. Knowles (New Zealand), M. Barboza Carneiro (Brazil), M. H. Oldenburg (Denmark), M. de Blanck (Cuba), M. Wang Tseng Sze (China), and Baron R. Lehman (Liberia).

On September 30, 1924, the fourth committee made its report to the Assembly, which adopted the scheme proposed, giving pensions to the judges and registrar, but not to the deputy judges of the Court. As adopted, the scheme provides as follows:²⁵

ARTICLE 1. Ordinary judges and registrars who have, for any reason whatever, ceased to hold office, shall be entitled to retiring pensions.

This right, however, shall not be recognized if the persons concerned have been dismissed for reasons other than the state of their health.

In the case of resignation, judges will not be entitled to pensions unless they have completed a period of five years' service, and the Registrar shall not be entitled to a pension unless he has completed a period of seven years' service.

Nevertheless, in the cases referred to in the previous paragraph, the Court may, by a special decision based on the fact that the persons concerned are in a precarious state of health and have insufficient means, grant the minimum pension to which such persons would be entitled, after five years' service in the case of judges, and after seven years' service in the case of the Registrar.

The payment of a pension shall not begin until the person entitled to such pension has reached the age of 65. Nevertheless, in exceptional cases and by a special decision of the Court, in consideration of the state of health or the means of the beneficiary, pensions may be paid to such beneficiary before he reaches the age of 65.

ARTICLE 2. No retiring pension payable under the present regulations shall exceed 15,000 Dutch florins in the case of judges and 10,000 Dutch florins in the case of the Registrar.

ARTICLE 3. Subject to the provisions of Article 2, judges shall be entitled to the payment of a pension equivalent to one-thirtieth of their salary in respect of each period of twelve months passed in the service of the Court, the salary being taken to comprise the following:

²⁴ Document C. 374. M. 136. 1924. X.

²⁵ From Document A. 132. 1924. V (Annex). See also *League of Nations Off. Jour.*, Spec. Supp. 21, pp. 35-37.

- (1) Fixed annual salary;
- (2) The whole of the daily duty allowances, the minimum number of days taken for the purpose of this calculation being 180; the duty allowance of the President of the Court shall be reckoned as being 35,000 florins per year.

In calculating the salary, no account shall be taken of sums received as subsistence allowance.

A registrar shall be entitled to the payment of a pension equivalent to one-fortieth of his salary in respect of each period of twelve months passed in the service of the Court.

If a person entitled to a pension is re-elected to office, the pension shall cease to be payable during his new term of office; at the end of this period, however, the amount of his pension shall be determined as provided for above, on the basis of the total period during which he discharged his duties.

ARTICLE 4. Subject to the provisions of Article 3, retiring pensions shall be payable monthly in arrears during the life-time of the beneficiary.

ARTICLE 5. Retiring pensions shall be regarded as coming under the "Expenses of the Court," within the meaning of Article 33 of the Statute of the Court.

ARTICLE 6. The Assembly of the League of Nations may, on the proposal of the Council, amend the present regulations.

Nevertheless, any amendment so made shall not apply to persons elected before the amendment in question was adopted, unless they give their consent thereto.

THE COURT AND THE LONDON REPARATIONS CONFERENCE

On November 30, 1923, the Reparation Commission established by the Treaty of Versailles appointed two committees of experts, the first of which was directed to consider the "means of balancing the budget and the measures to be taken to stabilize the currency" of Germany.²⁶ On April 9, 1924, the First Committee of Experts presented to the Reparation Commission a reparation plan (known as the Dawes Plan). On July 16, 1924, a conference on the application of this plan met in London, and its final act was executed on August 16, 1924. The governments of Belgium, the British Empire (with the Dominions and India), France, Greece,

²⁶ See George A. Finch, "The Dawes Report on German Reparation Payments," *Amer. Jour. Int. Law*, xviii, 419.

Italy, Japan, Portugal, Roumania and the Serb-Croat-Slovene State were represented as Allied governments, and representatives of the United States were present "with specifically limited powers," as well as representatives of Germany. Four "mutually inter-dependent" agreements were entered into.²⁷ Agreement I, between the Reparation Commission and the German government, does not directly refer to the Court, though it provides, III (b), for the settlement of any disputes between the Reparation Commission and Germany with regard to the interpretation either of Agreement I itself, or the experts' plan, or the consequent German legislation, in accordance with the conditions set out in Agreement II between the Allied governments and Germany. The latter provides for a decision of three arbitrators appointed for five years, one to be appointed by the Reparation Commission, one by Germany, and one by agreement of both, or, failing such agreement, by the President for the time being of the Permanent Court of International Justice. It also provides for various other appointments to be made by the President of the Court in the event of deadlocks.

Agreement III, between the Allied governments and Germany, deals with the execution of the experts' plan and provides (Art. 10) that any dispute with regard to the Agreement itself, if it cannot be settled by negotiation, shall be submitted to the Court. Agreement IV is an Inter-Allied agreement providing for certain appointments to be made by the President of the Court in default of the success of other agencies, and providing that any dispute arising out of certain parts of the Agreement itself shall be submitted to the Court.

The four Agreements thus provide for eight possible appointments by the President of the Court, and they give the Court itself an important jurisdiction in certain classes of disputes. With such success at London, it is not surprising

²⁷ See George A. Finch, "The London Conference on the Application of the Dawes Plan," *Amer. Jour. Int. Law*, xviii, 707.

that, when the scene shifted to Geneva, arbitration was the new keynote to effort.

THE COURT AND THE PROTOCOL OF GENEVA

Throughout the discussions in the Fifth Assembly of the League of Nations of the subjects of arbitration, security, and disarmament, it was clear that the existence of the Court was to be reckoned an important factor in any arrangement that might be reached. The draft treaty of mutual assistance²⁸ discussed at the Fourth Assembly in 1923 had not proposed any extension of the Court's jurisdiction, except for the interpretation of the treaty itself. But when Premier McDonald addressed the Fifth Assembly on September 4, 1924, he raised the question whether "the optional clause in the Statute of the Permanent Court of International Justice would operate in war or in peace."²⁹ On September 6, 1924, the Assembly adopted a resolution requesting its first committee "to examine within what limits the terms of Article 36, paragraph 2, of the Statute establishing the Permanent Court of International Justice might be rendered more precise, and thereby facilitate the more general acceptance of the clause." On October 1, 1924, the first committee presented its report,³⁰ calling attention to the wide range of pos-

²⁸ *League of Nations Off. Jour.*, December, 1923, p. 1521.

²⁹ *Verbatim Record of the Fifth Assembly*, 6th Plenary Meeting, p. 3.

³⁰ In collaboration with the third committee; Document A. 135 (1). 1924. IX. The report states:

"Careful consideration of the article has shown that it is sufficiently elastic to allow of all kinds of reservations. Since it is open to the States to accept compulsory jurisdiction by the Court in respect of certain of the classes of dispute mentioned and not to accept it in respect of the rest, it is also open to them only to accept it in respect of a portion of one of those classes; rights need not be exercised in their full extent. In giving the undertaking in question, therefore, States are free to declare that it will not be regarded as operative in those cases in which they consider it to be inadmissible.

"We can imagine possible, and therefore legitimate, reservations, either in connection with a certain class of dispute, or, generally speaking, in regard to the precise stage at which the dispute may be laid before the Court. While we cannot here enumerate all the conceivable reservations, it may be worth while to mention merely as examples those to which we referred in the course of our discussions.

"From the class of disputes relating to 'the interpretation of a treaty' there may

sible reservations and suggesting no changes in the Statute in this regard.

It was on the basis of this conclusion that there was included in the Protocol for the Pacific Settlement of International Disputes, drawn by the first and third committees of the Fifth Assembly, the following provision (Art. 3):

The signatory States undertake to recognise as compulsory, *ipso facto*, and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but without prejudice to the right of any State, when acceding to the special protocol provided for in the said Article and opened for signature on December 16th, 1920, to make reservations compatible with the said clause.

Accession to this special protocol, opened for signature on December

be excluded, for example, disputes as to the interpretation of certain specified classes of treaty, such as political treaties, peace treaties, etc.

"From the class of disputes relating to 'any point of international law' there may be excluded, for example, disputes as to the application of a political treaty, a peace treaty, etc., or as to any specified question or disputes which might arise as the outcome of hostilities initiated by one of the signatory States in agreement with the Council or the Assembly of the League of Nations.

"Again, there are many possible reservations as to the precise stage at which a dispute may be laid before the Court. The most far-reaching of these would be to make the resort to the Court in connection with every dispute in respect of which its compulsory jurisdiction is recognised contingent upon the establishment of an agreement for submission of the case which, failing agreement between the parties, would be drawn up by the Court itself, the analogy of the provisions of the Hague Convention of 1907 dealing with the Permanent Court of Arbitration being thus followed.

"It might also be stated that the recognition of the compulsory jurisdiction of the Court does not prevent the parties to the dispute from agreeing to resort to a preliminary conciliation procedure before the Council of the League of Nations or any other body selected by them, or to submit their disputes to arbitration in preference to going before the Court.

"A State might also, while accepting compulsory jurisdiction by the Court, reserve the right of laying disputes before the Council of the League with a view to conciliation in accordance with paragraphs 1-3 of Article 15 of the Covenant, with the proviso that neither party might, during the proceedings before the Council, take proceedings against the other in the Court.

"It will be seen, therefore, that there is a very wide range of reservations which may be made in connection with the undertaking referred to in Article 36, paragraph 2. It is possible that apprehensions may arise lest the right to make reservations should destroy the practical value of the undertaking. There seems, however, to be no justification for such misgivings. In the first place, it is to be hoped that every Government will confine its reservations to what is absolutely essential. Secondly, it must be recognised that, however restrictive the scope of the undertaking may be, it will always be better than no undertaking at all."

16th, 1920, must be given within the month following the coming into force of the present Protocol.

States which accede to the present Protocol, after its coming into force, must carry out the above obligation within the month following their accession.

There is also provision in the Protocol (Art. 5) that, when a party to a dispute claims that it arises out of a matter which by international law is solely within the domestic jurisdiction of that party, the arbitrators acting under the provisions of the Protocol shall "take the advice of the Permanent Court of International Justice through the medium of the Council." Moreover, the Protocol provides (Art. 20) that any dispute as to its interpretation shall be submitted to the Court. This Protocol has now (December 1, 1924) been signed by fourteen states, and Czechoslovakia ratified during October, 1924. Its coming into force is conditioned, however, on the deposit of ratifications by ten members of the League in addition to three of the four Powers, — France, Great Britain, Italy, and Japan, — and on the adoption of a plan for the reduction of armaments by the Conference set to meet on June 15, 1925.

On October 2, 1924, as a result of the Protocol, M. Briand signed the optional clause giving the Court compulsory jurisdiction, making the following declaration:³¹

I hereby declare that, subject to ratification, the French Government gives its adhesion to the optional clause of Article 36, paragraph 2, of the Statute of the Court, on the condition of reciprocity, for a period of 15 years, with power of denunciation, should the Protocol of arbitration, security and the reduction of armaments signed this day lapse, and further subject to the observations made at the First Committee of the Fifth Assembly, according to the terms of which "one of the parties to the dispute may bring the said dispute before the Council of the League of Nations for the purposes of the pacific settlement laid down in paragraph 3 of Article 15 of the Covenant, and during such proceedings neither party may take proceedings against the other in the Court."

France is the twenty-third state to sign the optional clause, since San Domingo signed it on September 30, 1924.

³¹ Document C. L. 142. 1924. V.

On October 2, 1924, the Fifth Assembly adopted the following recommendation by a unanimous vote:

The Assembly,

Having taken cognisance of the report of the First Committee (Document A. 135. 1924) upon the terms of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice;

Considering that the study of the said terms shows them to be sufficiently wide to permit States to adhere to the special Protocol opened for signature in virtue of Article 36, paragraph 2, with the reservations which they regard as indispensable;

Convinced that it is in the interest of the progress of international justice and consistent with the expectations of the opinion of the world that the greatest possible number of States should, to the widest possible extent, accept as compulsory the jurisdiction of the Court,

Recommends,

States to accede at the earliest possible date to the special Protocol opened for signature in virtue of Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice.

NEW JURISDICTION FOR THE COURT

Among the publications of the Court a second edition of the volume ³² containing "Extracts from International Agreements affecting the Jurisdiction of the Court" has appeared, under date of June 1, 1924. This volume indicates the large extent to which provisions for resort to the Court have now come to be inserted in international treaties, both multipartite and bipartite.

The Court's jurisdiction has thus been enlarged by the Convention on the Suppression of the Circulation of and Traffic in Obscene Publications, of Geneva, September 12, 1923; the Convention relating to the Simplification of Customs Formalities, of Geneva, November 3, 1923; the Convention and Statute on the International Régime of Railways, of Geneva, December 9, 1923; the Convention and Statute on the International Régime of Maritime Ports, of Geneva, December 9, 1923; the Convention relating to Transmission of Electric Power, of Geneva, December 9, 1923; and

³² Series D, No. 4. See for the texts of the London Agreements, Series D, No. 4, addendum.

the Convention relating to the Development of Hydraulic Power, of Geneva, December 9, 1923.

The Treaty of Alliance and Friendship between France and Czechoslovakia, Paris, January 25, 1924; the Protocol relating to the Financial Reconstruction of Hungary, Geneva, March 14, 1924; the Convention concerning the Transfer of the Memel Territory, Paris, May 8, 1924 — all these enlarge the Court's compulsory jurisdiction.

On February 13, 1924, when the United States and the Netherlands renewed for five years the arbitration treaty of May 2, 1908, the two governments exchanged notes covering the possibility of utilizing the Court. Secretary Hughes stated in his letter to the Netherlands Minister on February 13, 1924:³³

On February 24 last the President proposed to the Senate that it consent under certain stated conditions to the adhesion by the United States to the Protocol of December 16, 1920, under which the Permanent Court of International Justice has been created at The Hague. In the event that the Senate gives its assent to the proposal, I understand that the Government of the Netherlands will not be averse to considering a modification of the Convention of Arbitration which we are renewing, or the making of a separate agreement, providing for the reference of disputes mentioned in the Convention to the Permanent Court of International Justice.

And on the same date the Netherlands Minister replied that . . . in the event of the adhesion by the United States to the Protocol of December 16, 1920, under which the Permanent Court of International Justice has been created at The Hague, the Government of the Netherlands will be willing to consider a modification of the Convention of Arbitration between the Government of the Netherlands and the United States, which we have renewed today, or to make a separate agreement, providing for the reference of disputes mentioned in the Convention to the Permanent Court of International Justice.

Similar exchanges have occurred with Great Britain³⁴ (June 23, 1923), France³⁵ (July 19, 1923), Japan³⁶ (August 23, 1923), and Norway³⁷ (November 26, 1923).

An interesting parallel development must also be noted.

³³ U. S. Treaty Series, No. 682.

³⁵ *Ibid.*, No. 679.

³⁶ *Ibid.*, No. 683.

³⁴ *Ibid.*, No. 674.

³⁷ *Ibid.*, No. 680.

In the General Claims Convention between the United States and Mexico,³⁸ signed at Washington, September 8, 1923, and proclaimed in the United States on March 3, 1924, provision was made for an arbitral commission, one member to be appointed by the President of the United States, one by the President of Mexico, and a third by agreement of the two governments; but, failing such agreement, by the President of the Permanent Administrative Council of the Permanent Court of Arbitration as described in the Convention for Pacific Settlement of International Disputes of October 18, 1907. A similar provision was also included in the Special Claims Convention between the United States and Mexico,³⁹ signed at Mexico City on September 10, 1923, and proclaimed in the United States on February 23, 1924.

In the convention between the United States and Norway concerning Prevention of Smuggling of Intoxicating Liquors, of Washington, May 24, 1924, provision is made for reference of claims by Norwegian vessels to the joint consideration of two persons, one nominated by each of the parties; but if such persons cannot agree, then for reference to the Permanent Court of Arbitration.⁴⁰ Similar provisions are to be found in the conventions between the United States and Germany,⁴¹ signed at Washington on May 19, 1924, and the United States and Sweden,⁴² signed at Washington on May 22, 1924, and the United States and Denmark,⁴³ signed at Washington, May 29, 1924, and the United States and Italy,⁴⁴ signed at Washington, June 3, 1924. These treaties, as well as the Claims Convention with Mexico, might have provided for such reference to the Permanent Court of International Justice if the United States had taken the action proposed by President Harding on February 24, 1923.

On September 26, 1924, several amendments to the Covenant of the League of Nations came into force, giving to the Court a clearer position in connection with the obligation of

³⁸ U. S. Treaty Series, No. 678.

³⁹ *Ibid.*, No. 676.

⁴⁰ *Ibid.*, No. 689.

⁴¹ *Ibid.*, No. 694.

⁴² *Ibid.*, No. 698.

⁴³ *Ibid.*, No. 693.

⁴⁴ *Ibid.*, No. 702.

members of the League of Nations to submit their disputes before going to war "either to arbitration or *judicial settlement* or to enquiry by the Council." The third paragraph of Article 13 of the Covenant as amended now reads:

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

An important treaty relating to the Court's jurisdiction was signed at Rome by representatives of Italy and Switzerland on September 20, 1924. M. Motta stated to the Assembly of the League of Nations that it provided that all disputes should be taken to the Permanent Court of International Justice when the resources of conciliation have been exhausted. The treaty is in line with Switzerland's recent policy indicated by her treaty with Germany of December 3, 1921,⁴⁵ with Hungary, signed on June 18, 1924, and with Brazil, signed on June 23, 1924.

Italy and Switzerland have now agreed to set up a permanent commission of conciliation of five members, and if its finding is not accepted in any dispute, the following articles of the treaty provide for the jurisdiction of the Permanent Court of International Justice:

ARTICLE 15. Si l'une des Parties n'accepte pas les propositions de la Commission permanente de conciliation ou ne se prononce pas dans le délai fixé par son rapport, chacune d'elles pourra demander que le litige soit soumis à la Cour Permanente de Justice Internationale.

Dans le cas où, de l'avis de la Cour, le litige ne serait pas d'ordre juridique, les Parties conviennent qu'il sera tranché *ex aequo et bono*.

ARTICLE 16. Les Parties contractantes établiront, dans chaque cas particulier, un compromis spécial déterminant nettement l'objet du différend, les compétences particulières qui pourraient être dévolues à la Cour Permanente de Justice Internationale, ainsi que toutes autres conditions arrêtées entre elles.

Le compromis sera établi par échange de notes entre les Gouvernements des Parties contractantes.

⁴⁵ League of Nations, *Treaty Series*, xii, 272-293. For comment on this treaty, see Gossweiler, *L'Arbitrage International avant 1914 et après 1919*, pp. 136 ff.

Il sera interprété en tous points par la Cour de Justice.

Si le compromis n'est pas arrêté dans les trois mois à compter du jour où l'une des Parties a été saisie d'une demande aux fins de règlement judiciaire, chaque Partie pourra saisir la Cour de Justice par voie de simple requête.

ARTICLE 17. Si la Cour Permanente de Justice Internationale établissait qu'une décision d'une instance judiciaire ou de toute autre autorité relevant de l'une des Parties contractantes se trouve entièrement ou partiellement en opposition avec le droit des gens, et si le droit constitutionnel de cette Partie ne permettait pas ou ne permettait qu'imparfaitement d'effacer par voie administrative les conséquences de la décision dont il s'agit, il serait accordé à la Partie lésée une satisfaction équitable d'un autre ordre.

ARTICLE 18. L'arrêt rendu par la Cour Permanente de Justice Internationale sera exécuté de bonne foi par les Parties.

Les difficultés auxquelles son interprétation pourrait donner lieu seront tranchées par la Cour de Justice, que chacune des Parties pourra saisir à cette fin par voie de simple requête.

ARTICLE 19. Durant le cours de la procédure de conciliation ou de la procédure judiciaire, les Parties contractantes s'abstiendront de toute mesure pouvant avoir une répercussion préjudiciable sur l'acceptation des propositions de la Commission de conciliation ou sur l'exécution de l'arrêt de la Cour Permanente de Justice Internationale.

ARTICLE 20. Les contestations qui surgiraient au sujet de l'interprétation ou de l'exécution du présent traité seront, sauf convention contraire, soumises directement à la Cour Permanente de Justice Internationale par voie de simple requête.

The treaty must be ratified, and it was submitted for approval to the Federal Assembly of the Swiss Confederation on October 28, 1924.

CASES BEFORE THE COURT

In addition to the Mavrommatis case, which has been reserved for judgment on the merits, the Court may have to take jurisdiction of the zones question, which has long been the subject of negotiations between France and Switzerland. On October 30, 1924, representatives of the the two governments signed a *compromis d'arbitrage*, of which the first two articles read as follows: ⁴⁶

⁴⁶ *Le Temps*, November 1, 1924, p. 6.

ARTICLE 1. Il appartiendra à la Cour Permanente de Justice Internationale de dire si, entre la France et la Suisse, l'article 435, alinéa 2, du Traité de Versailles, avec ses annexes, a abrogé ou a pour but de faire abroger les stipulations du Protocole des Conférences de Paris du 3 Novembre 1815, du Traité de Paris du 20 Novembre 1815, du Traité de Turin du 16 Mars 1816, et du Manifeste de la Cour des Comptes de Sardaigne du 9 Septembre 1829, relatives à la structure douanière et économique des zones franches de la Haute-Savoie et du Pays de Gex, en tenant compte de tous faits antérieurs au Traité de Versailles, tels que l'établissement des douanes fédérales en 1849, et jugés pertinents par la Cour.

Les Hautes Parties contractantes sont d'accord pour que la Cour, dès la fin de son délibéré sur cette question et avant tout arrêt, impartisse aux deux Parties un délai convenable pour régler entre elles le nouveau régime desdits territoires dans les conditions jugées opportunes par les deux Parties, ainsi qu'il est prévu par l'article 435, alinéa 2, dudit Traité. Le délai pourra être prolongé sur la requête des deux Parties.

ARTICLE 2. À défaut de Convention conclue et ratifiée par les Parties dans le délai fixé, il appartiendra à la Cour, par un seul et même arrêt rendu conformément à l'article 58 du Statut de la Cour, de prononcer sa décision sur la question formulée dans l'article premier ci-dessus et de régler, pour la durée qu'il lui appartiendra de déterminer, et en tenant compte des circonstances actuelles, l'ensemble des questions qu'implique l'exécution de l'alinéa 2 de l'article 435 du Traité de Versailles.

Si l'arrêt prévoit l'importation de marchandises en franchise ou à droits réduits à travers la ligne des douanes fédérales, ou à travers la ligne des douanes françaises, cette importation ne pourra être réglée qu'avec l'assentiment des deux Parties.

The *compromis* must be ratified, and each of the parties agrees to deposit with the Court, within six months thereafter, its *mémoire* (case); within the following five months, its *contre-mémoire* (counter-case); and within the following five months, its *réplique*. The conclusion of the proceedings may thus require a considerable time.

An item in the agenda of the Fifth Assembly (Item 14) of the League of Nations dealt with the "reference of certain questions to the Permanent Court of International Justice for an advisory opinion." This was due to a request of the Lithuanian government, dated April 21, 1923, the consideration of which had been postponed by the Fourth Assembly at Lithuania's request.⁴⁷ On September 6, 1924, the Lithu-

⁴⁷ *Records of the Fourth Assembly, Plenary Meetings*, pp. 115-116.

anian government submitted a memorandum on the matter to the Assembly,⁴⁸ but on September 13, 1924, it withdrew the item from the agenda, reserving the submission of the matter to a future Assembly.⁴⁹

SOME RESULTS OF THE COURT'S JUDGMENTS AND OPINIONS

With three years passed since the work of the Court began, it is interesting to note the action which has followed the twelve judgments and opinions rendered. Such action is not an adequate measure of the Court's influence, for the mere fact of the existence of the Court has doubtless influenced the conduct of foreign affairs in many instances.⁵⁰ Nor does it necessarily reflect the extent to which the Court has contributed to the building of international law. But it affords some basis for judging the respect paid to the Court, and gives grounds for expectations in the future.

The first advisory opinion, on the question as to the nomination of the Workers' Delegate of the Netherlands, at the third session of the International Labor Conference, announced on July 31, 1922, has furnished a guide for the choice of delegates to later sessions of the International Labor Conference; and the precise difficulty which arose at the third Conference does not seem to have arisen again.⁵¹ The second and third advisory opinions of the Court, concerning the competence of the International Labor Organization with reference to agricultural labor and agricultural production, were enthusiastically received by the Director of the International Labor Office, who said in his report in 1922:⁵²

⁴⁸ A. 54. 1924. VII.

⁴⁹ *Verbatim Record of Fifth Assembly*, Sixteenth Plenary Meeting.

⁵⁰ For instance, in the conduct of the Corfu crisis in 1923. See Manley O. Hudson, "The Permanent Court of International Justice and World Peace," *Annals of the American Academy of Political and Social Science*, cxiv, 122 (July, 1924).

⁵¹ See the Report of the Fourth Session of the International Labor Conference (1922), ii, 645-646 for the Director's comment on the opinion. A difficulty of a different nature arose in 1923, with reference to the credentials of a Japanese delegate. See Report of the Fifth Conference, 1923, i, 68 ff.

⁵² Report of the Fourth Session of the International Labor Conference (1922), ii, 704-705.

The position maintained by the International Labour Organization has thus been vindicated by the highest Court. The solution has thus been found of a difficulty which has without doubt considerably handicapped the Office in its work during the past eighteen months. . . . It is with confidence and increased energy that the Office, strengthened by the decision of the Court, will continue its work.

A better indication of the reception of the opinions, perhaps, is the statement to the International Labor Conference at its fourth session, in 1922, by the Marquis De Vogüé, President of the Society of French Agriculturists, and substitute delegate at the Conference, on October 25, 1922:⁵³

I do not wish to reopen the debate here on the question of agricultural competence, or to repeat the reasons which led the French Government to take up the attitude which it adopted in that regard. We have accepted the decision of the Permanent Court of International Justice on this point with the loyalty and deference which is due to that great juridical body, and the best proof of the spirit in which we have accepted that decision is my presence here to-day. . . .

We wish to coöperate most loyally in the work of the International Labour Office with regard to agriculture, subject to the terms of Article 427 of the Treaty of Peace, which lays down the essential principles under which such work must be carried on.

Considering the bitterness of the previous argument, this was a fortunate solution which has greatly added to the effectiveness of the work of the International Labor Organization.

The fourth advisory opinion of the Court, with reference to the nature of the question involved in the Tunis-Morocco dispute between Great Britain and France, was announced on February 7, 1923, and it led very promptly to an exchange of notes on May 24, 1923, which effected a settlement of the dispute.⁵⁴ The French government agreed to bring certain measures into force in Tunis by January 1, 1924. The agreement was a direct result of the Court's opinion, and on December 20, 1923, it was executed by the promulgation of a French law,⁵⁵ cancelling the decrees of November 8, 1921, in

⁵³ Report of the Fourth Session of the International Labor Conference (1922), i, 98. The statement was made in French.

⁵⁴ See *Amer. Jour. Int. Law*, xviii, 6, note.

⁵⁵ *Journal Officiel de la République Française*, 21 Dec., 1923, pp. 11846-11847.

Tunis, which had led to the dispute, and substituting provisions for the acquisition of French nationality in the Regency of Tunis in accordance with the agreement of May 24, 1923.

The fifth advisory opinion of the Court, which is in reality a refusal to give an advisory opinion, was announced on July 23, 1923. The Court found it "inexpedient" to attempt to answer the question put to it by the Council with reference to provisions for protecting the Finnish minority in Eastern Carelia. On September 24, 1923, the Fourth Assembly of the League of Nations passed the following resolution:⁵⁶

The Assembly,

Recognising the importance of the question of Eastern Carelia,

Notes the declaration of the Finnish delegation that the Finnish Government, in the absence of any decision or any contrary opinion pronounced by any international jurisdiction, maintains its right to consider the clauses of the Treaty of Dorpat and the supplementary declarations relating to the status of Eastern Carelia, as agreements of an international order,

And requests the Council to continue to collect all useful information relating to this question with a view to seeking any satisfactory solution rendered possible by subsequent events.

On September 27, 1923, the Council of the League of Nations took note of the Court's reply, and entered a *caveat* inspired by certain expressions which the Court had used.⁵⁷

On August 17, 1923, in the case of the S.S. *Wimbledon*, the Court gave judgment that the German government "pay to the Government of the French Republic, at Paris, in French francs, the sum of 140,749 frs. 35 centimes, with interest at 6 per cent per annum from the date of this judgment, payment to be effected within three months from this day."⁵⁸ The German government seems to have moved within the three months, through the Kriegslasten-Kommission, to obtain the consent of the Guarantees committee of the Repara-

⁵⁶ *League of Nations Off. Jour.*, Supp. No. 11, p. 29.

⁵⁷ *Amer. Jour. Int. Law*, xviii, 10.

⁵⁸ *Publications of the Court*, Series A, No. 1, p. 33.

tion Commission for satisfying this judgment, and a negative reply seems to have been given.⁵⁹

On September 10, 1923, the Court handed down its sixth advisory opinion, with reference to the international obligations of Poland with respect to German settlers in Poland.⁶⁰ The Council of the League of Nations took note of the opinion on September 26, 1923, and invited the Polish government to communicate to it "information showing what measures the Polish Government proposes to take in order to settle the question of these colonists."⁶¹ On December 1, 1923, a proposed course of action was outlined by the Polish Minister of Foreign Affairs in a letter addressed to the Secretary-General. On December 14, 1923, the Council requested the representatives of Brazil, Great Britain, and Italy to report on the question, and their report⁶² was studied by the Council on December 17, 1923, when the Council adopted the following resolution:⁶³

(1) The Council of the League of Nations considers that the question of the German settlers in Poland can only be settled on the basis of the Advisory Opinion given by the Permanent Court of International Justice on September 10th, 1923, with which the Council is in agreement.

(2) Since it appears impossible for practical reasons to reestablish in their properties the settlers who have already been expelled, which would be, strictly speaking, the proper course, those settlers should receive from the Polish Government just compensation for the losses which they have suffered as the result of the fact that they have not been left in undisturbed possession of such properties.

(3) The Council hopes that the Polish Government may be willing to formulate proposals on the basis indicated above.

In the meanwhile the Council notes the assurance given by the representative of Poland to the effect that in every case where expulsion has not been carried out prior to the present date, the judgments of the Polish tribunals providing for expulsion will not be executed.

⁵⁹ In the *Virginia v. West Virginia* controversy, the U. S. Supreme Court gave judgment for \$12,393,929.50 against West Virginia in June, 1915. 238 U. S. 202. The judgment was not satisfied until 1919 or 1920.

⁶⁰ *Amer. Jour. Int. Law*, xviii, 13 ff.

⁶¹ *League of Nations Off. Jour.*, November, 1923, p. 1333.

⁶² *Ibid.*, February, 1924, p. 359.

⁶³ *Ibid.*, p. 360.

(4) In order to enable the Council to discharge completely its duty towards the persons belonging to the minority in question, it invites its Committee — the representatives of Brazil, Great Britain, and Italy — to continue to deal with the matter and to present a further report to the Council at its next meeting.

This Committee made a report to the Council on March 6, 1924, and the Polish representative submitted observations on the report on March 14. On March 15, the Council continued the Committee and gave it full powers to settle the matter as soon as possible in agreement with the Polish government.⁶⁴ After further negotiations, an agreement in principle was reached between this Committee and the Polish representatives, calling for the payment of a lump sum as compensation to dispossessed German settlers. An agent of the Committee, Captain Godfrey Phillimore, was despatched to Poland and succeeded in securing an agreement on the application of the principle referred to, and on the method of calculating the lump sum of 2,700,000 zlotys to be distributed among five hundred settlers.⁶⁵ The settlement was reported to the Council on June 17, 1924,⁶⁶ and after close cross-examination of Captain Phillimore by Lord Parmoor, the Council took note of the fact that the question was settled.

The seventh advisory opinion of the Court, handed down on September 15, 1923, related to the acquisition of Polish nationality, and involved an interpretation of Article 4 of the Polish Minorities Treaty. The opinion came before the Council of the League of Nations on September 27, 1923,⁶⁷ at which time questions were raised also as to the interpretation of Article 3 of the same treaty, by a special memorandum communicated by the British representative.⁶⁸ The Council "adopted" the advisory opinion, the Polish representative abstaining from voting, and invited its *rapporteur*, the Bra-

⁶⁴ *League of Nations Off. Jour.*, April, 1924, p. 548.

⁶⁵ The method is set forth in *Ibid.*, July, 1924, pp. 1020-1021. The calculation was based on 264 individual cases — 230 *Rentengutsverträge* and 34 *Pachtverträge*.

⁶⁶ *Ibid.*, p. 926.

⁶⁷ *Ibid.*, November, 1923, pp. 1333, 1489.

⁶⁸ *Ibid.*, p. 1490.

zilian representative, to offer his good offices to the Polish government for further negotiations, if desired, with the German government.

On December 10, 1923, the Polish government made known its willingness to accept such good offices for entering into direct negotiations with Germany at Geneva in regard to Articles 3 and 4 of the Minorities Treaty, with simultaneous negotiations elsewhere as to other problems. On December 14, 1923, the Council approved such a program.⁶⁹ The negotiations envisaged took place at Geneva, from February 12 to March 2, 1924, under the chairmanship of the Brazilian representative on the Council. On March 14, 1924, the Brazilian representative reported to the Council that agreement had not been reached;⁷⁰ that a new question of interpretation of Article 4 had arisen, as to the meaning of the words "the said territory"; that numerous other legal difficulties had arisen, though the parties were seeking settlement of them on "practical grounds." He reported also that the German delegation sought to have an arbitration tribunal created, and that the possibility of a second recourse to the Permanent Court of International Justice had been discussed. The German government desired to go to the Court, and the *rapporteur* seems to have favored such a course.

Meanwhile the negotiations on other matters being conducted at Warsaw had also reached an *impasse*, and the German government was urging the submission of those questions also to the Court. The Council requested the *rapporteur* to invite the two governments to continue their negotiations, extending them to cover all questions relating to Articles 3 and 5 of the Minorities Treaty, and

to request a third person, who, if no agreement to the contrary has been reached by the two Governments before April 1st, 1924, should be the President of the Arbitral Tribunal of Upper Silesia, to be good enough to undertake to preside over the negotiations mentioned in paragraphs (1) and (2) above, in the capacity of mediator; it being understood that, if the ne-

⁶⁹ See *League of Nations Off. Jour.*, February, 1924, pp. 351, 406.

⁷⁰ *Ibid.*, April, 1924, p. 722.

gotiations have not resulted in a complete agreement in the form of a signed Convention before June 1st, 1924, this third person shall have full power to arbitrate on all the questions still in dispute.⁷¹

The two governments accepted this invitation, and on April 28, 1924, negotiations were begun at Vienna under the chairmanship of M. Georges Kaeckenbeeck, chairman of the Arbitral Tribunal of Upper Silesia. The time limit of June 1, 1924, was exceeded, however, and on the proposal of the chairman the mediation was continued until the end, parallel with the arbitration procedure. An arbitral award was handed down by M. Kaeckenbeeck on July 10, 1924. On August 30, 1924, a convention was signed by which Germany and Poland accept the arbitral award by M. Kaeckenbeeck. The convention is to be ratified, and the exchange of ratifications was due to take place before December 1, 1924. On September 19, 1924, the settlement was reported to the Council of the League of Nations by the Brazilian representative, and the Council congratulated the two governments on the agreement which had been reached.⁷²

The unanimous advisory opinion of the Court, relating to the question of Jaworzina (Polish-Czechoslovakian Frontier), announced on December 6, 1923, came before the Council of the League on December 17, 1923, and the Council requested the Conference of Ambassadors "to invite the Delimitation Commission to furnish fresh proposals in conformity with the opinion of the Court and with the results of the Council's deliberations, without prejudice to any changes or arrangements which may be freely agreed to by the Governments concerned."⁷³ The report of the Delimitation Commission was duly communicated by the Conference of Ambassadors and came before the Council on March 12, 1924. The Council then proceeded to recommend a definite frontier, and suggested that the final decision should be accompanied by protocols "drawn up in terms as favorable as possible to the

⁷¹ *League of Nations Off. Jour.*, April, 1924, p. 543.

⁷² Council, 30th Session, P.V. 7 (1).

⁷³ *League of Nations Off. Jour.*, February, 1924, pp. 357, 364.

reciprocal interests of the inhabitants," with "a view to assuring facilities for communication and economic relations between the communes situated in the proximity."⁷⁴ This recommendation was approved by the Conference of Ambassadors on March 26, 1924. On May 6, following, a protocol was drawn up at Cracow, providing for the settlement of the economic questions affecting the Jaworzina region, as well as of other problems of a more general nature. This protocol was submitted to the Conference of Ambassadors at Paris, which, on September 5, 1924, adopted the following resolution:⁷⁵

(1) The frontier between Poland and Czechoslovakia in the Jaworzina region shall be traced by the Commission for the Delimitation of the Frontier between Poland and Czechoslovakia, in conformity with the opinion expressed by the Council of the League of Nations in its resolution of March 12th, 1924.

(2) The Conference takes note of the Protocol signed at Cracow on May 6th, 1924; this Protocol and its annexes are to be regarded as forming an integral part of the delimitation documents fixing the frontier of this region.

(3) The clauses of this Protocol relating to the Jaworzina region shall be binding upon the parties concerned as from the moment the delimitation has been effected, and independently of the entry into force of the Protocol itself.

(4) This decision shall be communicated to the Council of the League of Nations, to the Governments concerned and to the Delimitation Commission.

The ninth advisory opinion, relating to the question of the Monastery of Saint-Naoum, was handed down on September 4, 1924. On October 3, 1924, the matter came before the Council of the League of Nations, and after listening to a restatement of the legal situation by the Serb-Croat-Slovene representative, the Council expressed the opinion that the Court's opinion answered the first part of the question put by the Conference of Ambassadors, on June 5, 1924, and decided to communicate the opinion of the Court to the Conference of Ambassadors.⁷⁶

⁷⁴ *League of Nations Off. Jour.*, April, 1924, p. 521.

⁷⁵ C. 531. M. 144. 1924. VII, p. 2. ⁷⁶ Council, 30th Session, P.V. 19 (1).

THE UNITED STATES AND THE COURT

The proposal of President Harding that the United States shall adhere to the Protocol establishing the Court, on the four "conditions and understandings" named by Secretary Hughes, has now been before the Senate since February 24, 1923. On December 10, 1923, Senator Lenroot (Wisconsin) submitted a resolution in the Senate, setting forth a series of conditions requiring certain amendments in the Statute of the Court.⁷⁷ On April 7, 1924, Senator Pepper (Pennsylvania) submitted a resolution in the Senate,⁷⁸ asking that the Senate advise the President to call another World Conference "similar to the conference heretofore held at The Hague," the agenda to include "a consideration of plans for a world court either through a further development of the present Permanent Court of Arbitration at The Hague or through the disassociation of the present Permanent Court of International Justice at The Hague from the League of Nations." On May 5, 1924, Senator Lodge (Massachusetts) introduced a joint resolution in the Senate,⁷⁹ requesting the President to call a third Hague Conference and to recommend to it a draft statute for establishing a World Court of International Justice, the draft being closely modelled on the Statute of the Permanent Court of International Justice, but omitting all references to the League of Nations.

On May 5, 1924, also, Senator Swanson (Virginia) submitted a resolution in the Senate,⁸⁰ providing that the Senate advise and consent to adhesion by the United States to the Protocol of December 16, 1920, on "reservations and understandings" practically identical with those proposed by Secretary Hughes on February 17, 1923, but adding that the

⁷⁷ Senate Resolution 29, 68th Congress, 1st Session.

⁷⁸ Senate Resolution 204, 68th Congress, 1st Session.

⁷⁹ Senate Joint Resolution 122, 68th Congress, 1st Session. To accompany this, Senator Lodge presented Document No. 107, 68th Congress, 1st Session, entitled: "Organization of the World for Peace — a Plan by which the United States may cooperate with other nations to achieve and preserve the Peace of the World," by Chandler P. Anderson.

⁸⁰ Senate Resolution 220, 68th Congress, 1st Session.

signature of the United States should not be affixed "until the Powers signatory to such Protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adhesion by the United States." On May 20, 1924, Senator King (Utah) submitted a resolution,⁸¹ for the Senate's advising adhesion on condition that the Statute of the Court be first amended to admit the United States to participate in election of the judges. On May 20, Senator Pepper submitted a second resolution in the Senate,⁸² calling for the Senate's advice and consent to adhesion to the Court Protocol by the United States on condition that the Statute be amended in various respects. Later, on May 26, 1924, Senator Pepper submitted a report "from the Committee on Foreign Relations" to accompany this resolution.⁸³

No definitive action has yet been taken by the Senate (December 10, 1924), and on December 3, 1924, President Coolidge stated in his annual message to Congress:

America has been one of the foremost nations in advocating tribunals for the settlement of international disputes of a justiciable character. Our representatives took a leading part in those conferences which resulted in the establishment of the Hague Tribunal, and later in providing for a Permanent Court of International Justice. I believe it would be for the advantage of this country and helpful to the stability of other nations for us to adhere to the protocol establishing that court upon the conditions stated in the recommendation which is now before the Senate, and further that our country shall not be bound by advisory opinions which may be rendered by the Court upon questions which we have not voluntarily submitted for its judgment.⁸⁴

During the presidential campaign of 1924 both of the major political parties favored American participation in

⁸¹ Senate Resolution 233, 68th Congress, 1st Session. Senator King had submitted an earlier resolution on December 10, 1923. Senate Resolutions 32 and 36, 68th Congress, 1st Session.

⁸² Senate Resolution 234, 68th Congress, 1st Session. Also printed in document No. 116, 68th Congress, 1st Session.

⁸³ Report No. 634, 68th Congress, 1st Session. Reference should also be made to a resolution introduced in the House of Representatives on April 17, 1924, by Mr. Moore (Virginia), House Resolution 258, 68th Congress, 1st Session.

⁸⁴ New York *Times*, December 4, 1924, p. 8.

maintaining the Court. The Republican Party platform adopted at Cleveland provided: "We indorse the Permanent Court of International Justice and favor the adherence of the United States to this tribunal, as recommended by President Coolidge."⁸⁵ The Democratic party platform stated that "the Democratic Party renews its declaration of confidence in the ideal of world peace, the League of Nations, and the World Court of Justice, as together constituting the supreme effort of the statesmanship and religious conviction of our time to organize the world for peace."⁸⁶

The friendly and hospitable attitude of the American bar toward the Court and its work continues to manifest itself in frequent resolutions of bar associations. During 1924, the following were among the organizations expressing their approval of the Court and their hope for its future: the Boston Bar Association,⁸⁷ the Mississippi Bar Association, the Erie County Bar Association, the New York State Bar Association, the Ohio Bar Association, and the Vermont Bar Association.

⁸⁵ *Republican Campaign Textbook*, 1924, p. 67.

⁸⁶ *Democratic Campaign Book*, 1924, p. 40.

⁸⁷ *Massachusetts Law Quarterly*, May, 1924, p. 24.

V

ADVISORY OPINIONS OF NATIONAL AND INTERNATIONAL COURTS¹

I. NATIONAL COURTS

THE legal profession sometimes seems to have fewer opportunities for experimentation than professions engaged in other fields of human activity. In science, in politics, in business, it is more patent that experimentation furnishes the key to progress; the normal course seems quite clearly the process of trial and error. But in law, and more particularly in the judicial administration of law, we have limitations which are not so apparent, if indeed they are present, in other fields. The necessity of tying up the present with the past in a very patent manner constantly circumscribes judicial action. Yet even when they are constitutionally free, lawyers and judges are seldom equipped to launch forth with experiments, untied by deep roots in legal history.

A distinction may be drawn between the ordinary processes of legal reasoning and the common devices by which judicial action is effected. With regard to the former, most of our juridical concepts have a distinctly experimental nature which a glance at legal history at once reveals. The concept of tenure of land, for instance, was obviously an experiment based on social and political conditions. It may have been well adapted to the social purposes of English law in the fourteenth century, but our society has so outgrown its usefulness that we have discarded it informally, if not formally.² Similarly, the concept of natural law was an experiment

¹ Reprinted with slight revision from *Harr. Law. Rev.*, June, 1924, xxxvii, 970-1001.

² See the author's "Land Tenure and Conveyances in Missouri," *Missouri Law Series*, Missouri Bulletin, viii, 3; William R. Vance, "The Quest for Tenure in the United States," *Yale Law Journal*, xxxiii, 248.

which played a useful rôle in the formative period of American constitutional law. Though we have tried to make it a postulate of universal validity,³ though we still retain many of its vestigial ideas,⁴ few lawyers would think of using the concept to-day as Marshall used it a century ago.⁵ Both of these legal concepts — tenure and natural law — were bold experiments, and they must be said to have succeeded, in that for a period they served as useful tools in the administration of justice. It is not discreditable to the people who used them that we have now consigned them to the museum of juristic relics.

But with reference to judicial methods, the profession seems less willing to regard itself as engaged in experimentation. Rarely are we willing to try any experiment in the field of judicial action. The same desire for certainty and definiteness which begets our disposition to reduce substantive law to narrowly defined rules, begets also our disposition to reduce procedural law to narrowly restricted forms. Hence the courts have often hedged themselves in with self-imposed limitations⁶ which confine their range of action. A readiness to accept these limitations as "inherent" in judicial action easily leads to ignoring the relation between the work of courts and that of other agencies which serve the social order.

One of the consequences of this attitude toward the judicial function has been a serious neglect of many opportuni-

³ "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere." Oliver Wendell Holmes, "Natural Law," *Harv. Law Rev.*, xxxii, 40-41.

⁴ For instance, the following statement by the Supreme Court of Wisconsin: "However much we may be inclined to relieve the situation, we find this court, under well-established principles and rules, powerless. The broad principles of equity jurisprudence are not designed for any particular case or any particular situation, but, like the laws of nature, affect all in similar circumstances alike." Doerfler, J., in *Brosnihan v. Brosnihan*, 193 N. W. 74, 76 (Wis., 1923).

⁵ In *The Antelope*, 10 Wheat. (U. S.), 66 (1825), for example.

⁶ See Maurice Finkelstein, "Judicial Self-Limitation," *Harv. Law Rev.*, xxxvii, 338.

ties for service. We have become accustomed to thinking of courts only as machinery for handling conflicts between opposing individuals or groups after they have already come into clash. Certainly that is their chief function, as it is the chief function of the medical profession to deal with malignant disease. But the medical profession has long since abandoned the notion that its work is accomplished if it relieves suffering, and much of its energy is now devoted to preventive medicine. The legal profession has not similarly widened its sphere. It is true that most lawyers devote much of their time to precautions against future controversy. But we have made slow progress toward developing what might be called preventive adjudication, and the notion widely prevails that the judicial branch of the legal profession must necessarily confine itself to ripened conflicts.

AMERICAN ATTITUDE TOWARD DECLARATORY JUDGMENTS

This has led to our reluctance to extend hospitality to declaratory judgments. More than a generation ago the declaratory judgment became firmly established in English judicature,⁷ to such an extent that it has "completely revolutionized English remedial law." So that Mr. Sunderland tells us that "the American lawyer who peruses the current English reports is bewildered by their novelty. He is like a modern Rip Van Winkle, who, having gone to sleep in an age when courts were only the nemesis of wrongdoers, awakens to find that they have become the guardians and advisers of those who respect the law."⁸

⁷ "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make declarations of right whether any consequential relief is or could be claimed, or not." Order XXV, par. 5, Rules of the Supreme Court, 1883. For a list of cases in which English courts have granted declaratory relief, see *Amer. Bar Assn. Rep.*, xlviii, 337.

⁸ Edson R. Sunderland, "A Modern Evolution in Remedial Rights — the Declaratory Judgment," *Michigan Law Rev.*, xvi, 69, 77. See also Harold R. Medina, "Some Phases of the New York Civil Practice Act and Rules," *Columbia Law Rev.*, xxi, 113, 115.

But in spite of the English experience, the American branch of the profession has been slow to make the innovation. At certain periods of Anglo-American legal history, the courts might have worked out the device of a declaratory judgment without any legislation. To-day that would be too bold a method, and the change is left to depend on legislation. Declaratory judgment acts were enacted in Connecticut⁹ and New Jersey¹⁰ in 1915; in Michigan,¹¹ Wisconsin,¹² and Florida¹³ in 1919; in New York¹⁴ in 1920; in California,¹⁵ Hawaii,¹⁶ and Kansas¹⁷ in 1921; and in Virginia¹⁸ and Kentucky¹⁹ in 1922. The uniform act, drafted by the National Conference of Commissioners on Uniform State Laws in 1922,²⁰ has now been enacted in Colorado,²¹ North Dakota,²² Pennsylvania,²³ Tennessee,²⁴ and Wyoming.²⁵

Yet, in spite of this history, we find the Supreme Court of Michigan holding a declaratory judgments act unconstitutional in 1920,²⁶ and the legislature of Wisconsin repealing a declaratory judgments act in 1923,²⁷ without having given the experiment a fair trial. It is true that the constitutionality of the statute has been upheld in California,²⁸ Kansas,²⁹

⁹ See 1919 Conn. Gen. Stat., par. 5113.

¹⁰ See 1915 N. J. Acts, c. 116.

¹¹ See 1919 Mich. Pub. Acts, No. 150.

¹² See 1919 Wis. Sess. Laws, c. 242. See an article on "Declaratory Relief" by Justice Vinje of the Wisconsin Supreme Court, in *Marquette Law Rev.*, iv, 106.

¹³ See 1919 Fla. Gen. Acts, 148.

¹⁴ See 1920 N. Y. Laws, c. 925, § 473.

¹⁵ See 1921 Cal. Stat., c. 463.

¹⁶ See 1921 Hawaii Sess. Laws, Act 162.

¹⁷ See 1921 Kan. Sess. Laws, c. 168.

¹⁸ See 1922 Va. Acts, c. 517.

¹⁹ See 1922 Ky. Acts, c. 83.

²⁰ See 1922 *Handbook of National Conference of Commissioners on Uniform State Laws*, 382; Edwin M. Borchard, "The Uniform Act on Declaratory Judgments," *Harv. Law Rev.*, xxxiv, 697. See also *Columbia Law Rev.*, xxiv, 416.

²¹ See 1923 Colo. Sess. Laws, c. 98.

²² See 1923 N. Dak. Laws, c. 237.

²³ See 1923 Pa. Laws, 840.

²⁴ See 1923 Tenn. Pub. Acts, c. 29.

²⁵ See 1923 Wyo. Sess. Laws, c. 50.

²⁶ *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592; 179 N. W. 350 (1920).

²⁷ See 1923 Wis. Sess. Laws, c. 440.

²⁸ *Blakeslee v. Wilson*, 213 Pac. 495 (Cal., 1923).

²⁹ *State v. Grove*, 109 Kan. 619; 201 Pac. 82 (1921); *State v. Wooster*, 111 Kan. 830; 208 Pac. 656 (1922).

New York³⁰ [and Tennessee³¹]. But so committed are American lawyers to the notion that the competence of courts is necessarily limited to litigated cases and controversies that the practice is still somewhat in doubt, even where the constitutionality is no longer in question.

DECLARING STATUTES UNCONSTITUTIONAL

An interesting by-product of this attitude in the field of public law has been the recent tendency to deny that our courts ever declare statutes unconstitutional, and to assert that they stop short of this in merely passing on the application of statutes to particular questions affecting litigants.³² Thus, Mr. Justice Sutherland has recently declared,³³ speaking for the Supreme Court: "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." So he concluded that the power "amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." Mr. John W. Davis, in a presidential address to the American Bar Association, declared that "august as are the functions" of the Supreme Court, "surely they do not go one step beyond the administration of justice to individual litigants."³⁴ But Lord

³⁰ *Board of Education v. Van Zandt*, 119 Misc. 124; 195 N. Y. Supp. 297 (1922). See also *Braman v. Babcock*, 98 Conn. 549; 120 Atl. 150 (1923).

³¹ *Miller v. Miller*, 261 S. W., 965 (Tenn., 1924).

³² This does not apply to such procedure as that of New Jersey, permitting the Supreme Court to say, even in the absence of litigation *inter partes*, whether a statute has been duly enacted. *In re Public Utility Board*, 83 N. J. L. 303, 307; 84 Atl. 706, 708 (1912).

³³ *In Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923). See also *California v. San Pablo, etc.*, R. R. Co., 149 U. S. 308, 314 (1893).

³⁴ *Amer. Bar Assn. Jour.*, ix, 553, 557. Compare the "conclusion" of the Supreme Court in *Insurance Co. v. Morse*, 20 Wall. (U. S.) 445, 458 (1874), announced by Mr. Justice Hunt as follows: "The statute of Wisconsin . . . is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void."

Birkenhead found Mr. Davis's refinement "a little subtle," and expressed the view that "when an issue challenged by an individual raises the question whether a law is constitutional or not, the decision of the Supreme Court decides this question for all time, and if the decision is against the legislature the attempted law is stripped of its attempted authority."³⁵

It is not to be denied that American courts do declare statutes unconstitutional with respect to their application to actual cases that have arisen, in such a way that the statute is thereafter disregarded, not only with respect to such cases, but also with respect to other cases to which the questioned provisions apply. The question constantly arises, therefore, whether that process need involve the handling of actual litigation, whether American courts could not pass upon the constitutionality of legislation even before a clash has arisen among interests affected by the statute; and if this step should be taken, whether competence could be conferred on American courts to pass upon the constitutionality of proposed legislation before its enactment, so as to prevent a process of legislative stultification.

THE FEDERAL COURTS AND ADVISORY OPINIONS

The English practice, by which the Crown and the House of Lords consulted the judges on solemn occasions as to important questions of law, is well known.³⁶ But at an early date it was determined that the practice was not to be imported to America with respect to the Supreme Court of the

³⁵ *Amer. Bar Assn. Jour.*, ix, 579.

³⁶ See Van Vechten Veeder, "Advisory Opinions of the Judges of England," *Harv. Law Rev.*, xiii, 358; *Att'y-Gen'l of Ontario v. Att'y-Gen'l of Canada* (1912), A. C. 571, 586. On advisory opinions, in general, the most complete study is Ellingwood, *Departmental Coöperation in State Government* (Macmillan, 1918). See also Thayer, *Legal Essays*, pp. 42-59; Hugo Dubuque, "The Duty of Judges as Constitutional Advisers," *Amer. Law Rev.*, xxiv, 369; F. W. Grinnell, "Duty of the Court to Give Advisory Opinions," *Mass. Law Quarterly*, ii, 542. And see *Virginia Law Rev.*, x, 150; *Central Law Jour.*, xcv, 126.

See also *Re Judicature Act, 1924*, 26 *Ontario Weekly Notes*, 411.

United States. President Washington seems to have entertained a notion that there should be a measure of coöperation between the executive and judicial branches of the Federal Government.³⁷ In 1790, he intimated his willingness to receive suggestions from the justices with reference to the organization of our judicial system. But the justices declined to give such suggestions. Later, in 1793, at the time of the famous Genet episode, it was determined at a cabinet meeting to request the justices of the Supreme Court to answer a series of questions "comprehending all the suggestions of difference which existed between the executive and the Minister of France relative to the operation of the treaties between the two countries." The actual request was that the justices state whether "the public may with propriety be availed of their advice on questions arising in the effort to maintain the peace with France." On July 18, 1793, twenty-nine questions were submitted to the justices for opinions.³⁸ On July 23, 1793, the President assented to a delay until the opinions of absent justices could be obtained. But on August 8, 1793, the justices communicated to the President their refusal to give their opinions on the questions submitted. The justices found "strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments."³⁹

Some basis for this attitude of the federal courts is to be found in the constitutional provision as to the "judicial

³⁷ A proposal had been made in the Federal Convention of 1787 that "each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the supreme judicial court upon important questions of law, and upon solemn occasions." See Elliot, *Debates on the Federal Constitution*, i, 280.

³⁸ Jefferson's letter is published in *Correspondence and Public Papers of John Jay*, iii, 486. The questions are given in Sparks, *Life of Washington*, Appendix, x, 542. See also *Muskrat v. United States*, 219 U. S. 346, 354 (1911); Warren, *The Supreme Court in United States History*, i, 108 *et seq.*

³⁹ *Correspondence and Public Papers of John Jay*, iii, 488-489.

power" of the United States, which extends to "cases" and to "controversies" as specifically defined.⁴⁰ But it is significant that the question arose in 1793 in connection with a raging political controversy, and the giving of advisory opinions would probably seldom be more difficult or more embarrassing than with reference to the twenty-nine questions submitted. Mr. Warren calls it a "radical step" taken by the administration in asking for the opinions, though he admits that "the impression was prevalent at that period that the President had the right to seek the opinion of the Judges on questions of law."⁴¹ Professor Thayer conjectured that if the questions had been "brief and easily answered, the Court might, not improbably, have slipped into the adoption of a precedent that would have engrafted the English usage upon our national system."⁴²

THE STATE COURTS AND ADVISORY OPINIONS

At the time this attitude was being assumed by the justices of the Supreme Court of the United States, the justices of the Massachusetts Supreme Judicial Court had the duty to give advisory opinions⁴³ under the Constitution of 1780. The first opinion was given in 1781.⁴⁴ And, to date, approximately one hundred and forty advisory opinions have been given. It is interesting to note that many of these opinions have related to the constitutionality of proposed legislation, and the justices have frequently forestalled the necessity of declaring acts of the legislature unconstitutional by giving opinions in

⁴⁰ See U. S. Const., Art. III, § 2. "The exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred." Mr. Justice Day, in *Muskat v. United States*, 219 U. S. 346, 356 (1911). And see Mr. Charles E. Hughes's comment in *Amer. Bar Assn. Rep.*, xlv, 266. See also James Brown Scott, *The United States of America: A Study in International Organization* (1920), pp. 427-434.

⁴¹ Warren, *The Supreme Court in United States History*, i, 109.

⁴² Thayer, *Legal Essays*, p. 54.

⁴³ "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." Mass. Const., c. 3, Art. 2.

⁴⁴ 126 Mass. 547.

advance.⁴⁵ It is notable that the attempts in Massachusetts to repeal the constitutional provision have failed,⁴⁶ and the practice now seems a permanent part of the Massachusetts system. It seems probably more than a coincidence that the state which has the oldest constitution of all the states in the Union is also the state which has had this procedure since that constitution was adopted in 1780.

From Massachusetts, the provision for advisory opinions was copied into the constitutions of other states. It was adopted in the New Hampshire Constitution of 1784, in the Maine Constitution of 1820, in the Rhode Island Constitution of 1842, and it still maintains in all of these states. The second Missouri Constitution also adopted the provision in 1865, but it was dropped from the third Constitution of 1875. The practice was also adopted in the Florida Constitution of 1868, in the Colorado Constitution of 1886, and the South Dakota Constitution of 1889.

In some states also, advisory opinions have been given or provided for without constitutional authorization. In early days, advisory opinions were given by New York⁴⁷ and Pennsylvania judges.⁴⁸ In Minnesota, a statute authorizing the judges of the Supreme Court to give advisory opinions was declared unconstitutional.⁴⁹ A Delaware statute of 1852 to the same effect has lain more or less dormant until recent years.⁵⁰ A Vermont statute of 1864 was repealed in 1915.⁵¹ The Alabama legislature has recently enacted a similar statute, and the judges have already upheld its validity.⁵²

⁴⁵ A list of twenty-nine instances of opinions indicating that proposed legislation was not authorized by the constitution, is to be found in *Mass. Law Quart.*, i, 318.

⁴⁶ See F. W. Grinnell, *supra*, *Ibid.*, ii, 542, 548; Hugo A. Dubuque, *supra*, *Amer. Law Rev.*, xxiv, 369, 391 *et seq.*

⁴⁷ *People v. Green*, 1 Den. (N. Y.) 614 (1845). See *Harv. Law Rev.*, iv, 37.

⁴⁸ 3 Binney (Pa.), 595 (1808).

⁴⁹ In the Matter of the Application of the Senate, 10 Minn. 78 (1865). In 1866, the Connecticut judges refused to give an opinion requested by the legislature. 33 Conn. 586.

⁵⁰ See 1852 Del. Rev. Stat., c. 27. See *In re School Code of 1919*, 30 Del. 406, 108 Atl. 39 (1919).

⁵¹ See 1915 Vt. Laws, No. 84.

⁵² See 1923 Ala. Gen. Acts, 25.

The history of the advisory opinion in the United States has been due to the effect of so many lawyers' unwillingness to adopt an experimental attitude toward their tasks. Given the constitutional provision, some states have restricted its application in such a way that the experiment has not had a fair trial, and a basis for judging its usefulness has been lacking. This is clearly indicated by the ten years' experience of Missouri, which affords a clear and compassable basis for judgment.

EXPERIENCE WITH ADVISORY OPINIONS IN MISSOURI

The provision inserted in the Missouri Constitution of 1865 is obviously copied from the Massachusetts Constitution of 1780. It was a departure, however, in limiting the subject-matter of the consultation to "questions of constitutional law," and in providing that the opinions given should be published in connection with the reported decisions of the Supreme Court. The first request for an advisory opinion was made by the Governor on November 27, 1865, within six months after the adoption of the constitutional provision. Four "interrogatories" were put. The first related to the power of the state under a constitutional ordinance to order the sale of two railroads which had neglected to pay a tax, bills for that purpose having been introduced in the legislature. The Governor stated: "If the bills introduced are passed, they will be submitted to me for approval; and it may also become necessary to express my views on the questions involved by special message to the General Assembly." The second, third, and fourth interrogatories asked for an interpretation of the language of the same constitutional provision. All of these questions were answered by two of the three judges of the court promptly and without difficulty.⁵³

The second advisory opinion was requested by resolution of the state senate of December 9, 1865, putting three questions relating to the power of the general assembly with refer-

⁵³ 37 Mo. 129 (1865).

ence to incorporated companies. The three judges joined in prompt action, stating that they had "met with difficulties at the outset, arising out of the general and indefinite nature of the questions proposed," and that these difficulties had made it necessary to consider "the limits of the power conferred on the judges of the Supreme Court." It was said to be the function of the judges themselves to determine what are "questions of constitutional law" and what are "solemn occasions" within the meaning of the constitutional provision. The question must be "in its own nature, a judicial question, the final determination of which, by the organic frame of our government, properly belongs to the judiciary." It was said that the manner of giving such opinions was "somewhat novel and extra-judicial." The judges denied that the constitution had made them the "legal advisers of the Government, or of either House of the General Assembly"; or that they were to "take the place and perform the functions of the attorney-general." So it was determined that an advisory opinion would be given "only when some distinct question of constitutional powers is raised and presented as a judicial question, having immediate, direct and important bearing upon the action of the Governor, or either House of the General Assembly, upon some public and solemn occasion, depending for its solution upon a judicial construction or interpretation of some provision, clause or word of the constitution." The particular occasion was found to lack this nature, and hence the judges refused to give an opinion.⁵⁴

The third opinion was requested by the Governor on January 22, 1866, as to the power of the legislature to pass an act already on the statute books. The reply⁵⁵ was given by one of the judges, who stated that the other judges concurred, to the effect that the legislature had such power.

The fourth opinion was requested by the Governor on February 8, 1869, whether the legislature had power to repeal

⁵⁴ 37 Mo. 135 (1865).

⁵⁵ 37 Mo. 139 (1866).

a statute. The three judges briefly replied that the legislature had such power.⁵⁶ It does not appear whether the repeal was being contemplated.

The fifth request for an advisory opinion was made by the Governor on January 22, 1872, concerning the power of fund commissioners, acting under certain statutes, to make payments of state bonds, some of which already had been paid. Three questions were submitted, none of which seems to have involved a constitutional question. Two of the three judges gave separate, concurring replies, arguing that the occasion was sufficiently "solemn" to require an answer.⁵⁷

The sixth advisory opinion was requested by a senate resolution in 1873, concerning the constitutionality of legislation then on the statute books, relating to the release of claims against the North Missouri Railroad Co. and the sale of the Pacific Railroad to the Atlantic and Pacific Railroad. The five judges joined in a reply,⁵⁸ refusing to give an opinion on the ground that "it is not contemplated by the constitution, that the judges are to give their opinion on any questions which may afterwards come before them for adjudication. The expression of opinions on such matters might be looked upon as pre-judging the case, and would greatly embarrass the Court in its subsequent adjudications." It was also pointed out that the questions in this instance involved "the consideration of private rights of individuals and corporations," whereas "the judges can only be called on for opinions touching matters of public concern alone."

The seventh advisory opinion was requested by the house of representatives on January 31, 1873, as to the constitutionality of a township organization law then on the statute books, concerning which grave doubts were said to have arisen throughout the state. The opinion was requested "with a view to further and effective legislation." Four judges gave an opinion⁵⁹ that the law was constitutional,

⁵⁶ 43 Mo. 351 (1869).

⁵⁷ 49 Mo. 216 (1872).

⁵⁸ 51 Mo. 586 (1873).

⁵⁹ 55 Mo. 295 (1874).

though they entered a *caveat* that "this Court has no authority under the constitution to give opinions on abstract questions of law." For in this case, the judges were giving their opinion "as law officers *pro hac vice* ." It was also pointed out that the opinions were the opinions of the judges and not of the court. The fifth judge dissented in a separate opinion, given on the day after that of his colleagues.

The eighth opinion was requested by a senate resolution in 1874, on the constitutional power of the state legislature to change the boundaries of the judicial circuits of the state. All of the judges concurred in an opinion⁶⁰ given by Judge Napton "on behalf of the Supreme Court," that the legislature had such power.

The ninth opinion was requested by a resolution of the house of representatives of February 27, 1874, relating to the power of the legislature to pass proposed legislation. The five judges, declining to answer the question, took occasion to review their constitutional position with reference to advisory opinions.⁶¹ They stated that the provision of the constitution was "somewhat anomalous in its character," and that it was "couched in terms vague, indistinct and hardly susceptible of definite interpretation." "What is a solemn occasion, or what may be regarded as an important question of constitutional law, are matters not easily defined." Hence it was found to be improper for a court of last resort to express in advance "opinions upon points which may subsequently come before them in contested cases." Such opinions would be " *ex parte* , without argument and without a due consideration of the facts, which might be material to a proper conclusion." It was found, however, that the questions propounded did not relate to constitutional law.

The tenth advisory opinion was requested by the Governor in 1874, concerning the constitutionality of an act already on the statute books, attaching Benton County to the twenty-fifth judicial circuit. The Governor desired to know whether

⁶⁰ 55 Mo. 215 (1874).

⁶¹ 55 Mo. 497 (1874).

the act was constitutional, and whether the person elected as judge of the circuit was entitled to a commission. Judge Wagner "delivered the opinion of the court in response," declining to answer the questions.⁶² With reference to the first question, it was said to be "the province of the supreme judges to only give an opinion or adjudicate" upon laws already on the statute books, "when the question of their validity is raised in some proceeding" before the court. In this case it was found that private rights were involved, and that "these rights should be determined only when the parties interested are regularly before a tribunal where they can be heard."

Thus in four instances out of ten, the judges of the Missouri Supreme Court refused to give any opinion.⁶³ They circumscribed their own powers by looking upon themselves as legal advisers to the political departments of the state government, so that their advice was limited to situations in which private rights could in no way be involved. No effort was made, however, to deal with public questions in such a way as to safeguard private rights. The judges seem to have complained that they were not assisted by counsel, and yet no effort was made to procure such assistance, and in no case did counsel appear. As one reads the opinions to-day, it seems clear that the experiment did not have a fair trial at the hands of the judges of the Supreme Court of Missouri. In view of the stultification, it is not surprising that the provision for advisory opinions was abandoned in the Missouri Constitution of 1875. References were made in the debates of the Constitutional Convention of 1875 to the overcrowded docket of the Supreme Court, and that may have been a reason for relieving the judges of a duty which they had found irksome, but which in some instances had served to make the machinery of the state government more efficient.

⁶² 58 Mo. 369 (1874).

⁶³ For instances of refusal in other states, see *Harv. Law Rev.*, x, 50.

RECEPTION OF ADVISORY OPINIONS INTO AMERICAN
JURISPRUDENCE

It is to be noted that in most American jurisdictions the opinions given are the opinions of the judges and not of the court upon which they sit. This is not true in Colorado, however.⁶⁴ This is the justification for the oft-repeated statement that the advisory opinions of the judges are not binding on the courts in later litigation.⁶⁵ But binding quality is a matter of degree; and while it may be true that an advisory opinion is not entitled to the weight of ordinary judicial precedents, and while a matter handled in an advisory opinion may not thereby become *res adjudicata*, still, the views given on solemn consideration by learned judges, acting in their official capacity, would seem to call for serious consideration. *Stare decisis* is inapplicable, but short of that there is room for giving advisory opinions great weight.

In this connection it is important to ascertain whether advisory opinions are given after full opportunity for counsel to be heard and for all questions to be fully argued. It seems to have been assumed by the Missouri judges that counsel could not be heard. The Massachusetts justices have complained on more than one occasion that they were compelled to act without sufficient assistance from counsel, and in one instance they have referred to advisory opinions as "necessarily given without the aid of arguments of counsel."⁶⁶ It is difficult to see why this should be true. The court could easily call in *amici curiae*, and the Massachusetts court did once hear argument,⁶⁷ and occasionally now receives briefs.⁶⁸

⁶⁴ See Ellingwood, *op. cit.*, p. 221.

⁶⁵ Professor James Bradley Thayer's statement, that "it is of grave importance that the notion of their binding quality should be dispelled," seems extreme. *Legal Essays*, p. 59. While the Massachusetts court's attitude that the justices will be "bound most sedulously to guard against any influence flowing from their previous consideration" if a question later arises for decision, seems wholly awry. Cf. *Loring v. Young*, 239 Mass. 349, 361, 132 N. E. 65, 68 (1921); *Building Inspector of Lowell v. Stoklosa*, 145 N. E. 262 (Mass., 1924).

⁶⁶ See 190 Mass. 611; 77 N. E. 820 (1906). See also *Harv. Law Rev.*, x, 50.

⁶⁷ See *Adams v. Bucklin*, 7 Pick. (Mass.) 121, 125 (1828).

⁶⁸ See F. W. Grinnell, *supra*, *Mass. Law Quart.*, ii, 542, 548.

In Colorado, arguments are customary, and the recent statute in Alabama authorizes the justices to request briefs from the attorney-general and to receive briefs from "other attorneys as *amicus curiae*." ⁶⁹ A recent instance in Delaware is instructive. When the Governor requested an opinion, the Chancellor and judges at once replied:

In view of the great and general interest felt in the question you have submitted, we think our opinion should not be based upon a hasty and imperfect consideration of the matter, but should be reached after a careful examination of the statute and the law applicable to the question raised. To that end we have concluded that at least a week's time is essential, and that an opportunity should be given to any attorneys who may desire to argue before us either side of the question.

We will meet again in the County Court Room, at Dover, on Wednesday, September 10th, 1919, at eleven o'clock, a. m., and will be pleased to hear and consider any arguments that may then be submitted either orally or in writing.

The Chancellor and Law Judges would much prefer to determine the question in a regular judicial proceeding, but they realize that such a proceeding would involve more delay than would be justified, in view of the necessity for a reasonably early decision.⁷⁰

Thereafter, the attorney-general of the state and eight other lawyers argued the question.

If this attitude were assumed by judges generally, it would be difficult to justify a statement commonly made that the giving of advisory opinions is not a "judicial function." ⁷¹

The advisory opinion is not unknown in the jurisprudence of other countries. In Canada, it has a long and instructive history,⁷² and the practice has been greatly reinforced by a comparatively recent decision of the Judicial Committee of the Privy Council ⁷³ holding a statute providing for advisory opinions constitutional. The constitutions of Colombia ⁷⁴

⁶⁹ See 1923 Ala. Gen. Acts, 25.

⁷⁰ *In re School Code of 1919*, 30 Del. 406, 409; 108 Atl. 39, 40 (1919).

⁷¹ See *Amer. Jour. Int. Law*, xviii, 28.

⁷² See Ellingwood, *op. cit.*, pp. 79-93.

⁷³ *Att'y-Gen'l for Ontario v. Att'y-Gen'l for Dominion of Canada* (1912), A. C. 571. [The recent report of the Judicial Committee of the Privy Council with reference to the Irish Boundary Commission is very interesting in this connection. See *British Parl. Papers*, 1924, Cmd. 2214.]

⁷⁴ Const. of 1886, Art. 90.

and Panama⁷⁵ confer such jurisdiction on the courts of those countries, also; and when Hawaii was an independent state, the practice was established there.⁷⁶

II. INTERNATIONAL COURTS

In international jurisprudence, the advisory opinion has been almost if not quite unknown. We have had too little international judicial organization for the device to have been used. The treaty of February 29, 1892, providing for the Behring Sea arbitration between the United States and Great Britain, directed the arbitrators to render a decision on each of five enumerated points of law; and provided, in Article VII, that

if the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such regulations should extend.⁷⁷

The nine regulations drawn up by the arbitrators⁷⁸ resemble legislation more nearly than an advisory opinion.

⁷⁵ Const. of 1904, Art. 105.

⁷⁶ Const. of 1854, Art. 88.

⁷⁷ See *U. S. Treaties and Conventions* (Malloy), i, 746, 749.

⁷⁸ *Ibid.*, p. 754. Recent conventions drawn up at League of Nations conferences provide for a new type of advisory opinions. Thus Article 22 of the Convention on Customs Formalities, of November 3, 1923, reads:

"Should a dispute arise between two or more Contracting States as to the interpretation or application of the provisions of the present Convention, and should such dispute not be settled either directly between the parties or by the employment of any other means of reaching agreement, the parties to the dispute may, before resorting to any arbitral or judicial procedure, submit the dispute, with a view to an amicable settlement, to such technical body as the Council of the League of Nations may appoint for this purpose. This body will give an advisory opinion after hearing the parties and effecting a meeting between them if necessary.

"The advisory opinion given by the said body will not be binding upon the parties to the dispute unless it is accepted by all of them, and they are free either after resort to such procedure or in lieu thereof to have recourse to any arbitral or judicial procedure which they may select, including reference to the Permanent Court of International Justice as regards any matters which are within the competence of that Court under its Statute." *League of Nations Off. Jour.* (1923), p. 1573.

See also the Conventions of the Second Conference on Transit and Communications, Geneva, 1923. *Ibid.* (1924), pp. 259, 277, 285, 293.

When jurisdiction to give advisory opinions was conferred on the Permanent Court of International Justice, it was quite properly called a "novelty,"⁷⁹ although it represented no departure from national precedents. But even after the step had been taken, a disposition was evident to confine it very narrowly, to circumscribe its chance for success as an experiment, and it is therefore important that its extent and nature be clearly understood.

THE COVENANT OF THE LEAGUE AND ADVISORY OPINIONS

The competence of the Permanent Court of International Justice with respect to advisory opinions derives from Article 14 of the Covenant of the League of Nations, which provides as follows:

The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

The origin of this statement about advisory opinions is to be traced to a proposal of the French delegates on the League of Nations Commission at the Peace Conference. It was the French idea that some body would have to be given power to interpret the Covenant itself, and as first proposed, this advisory jurisdiction of the Court would have been thus limited. In the redrafting, however, the provision assumed its final general form. The divergence between the French and English texts has been relied upon as indicating that the Court is not obliged to give opinions that may be requested,⁸⁰ but the American experience indicates that the Court might

⁷⁹ By M. Å. Hammarskjöld, the able Registrar of the Court, in an article on "The Early Work of the Permanent Court of International Justice," *Harv. Law Rev.*, xxxvi, 704, 715.

⁸⁰ By Judge John Bassett Moore, in his memorandum on "The Question of Advisory Opinions," submitted to the Court on February 18, 1922. See *Publications of the Court*, Series D, "Acts and Documents Concerning the Organization of the Court," No. 2, pp. 383-398.

decline even if the language of the two texts were clearly imperative.

THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND ADVISORY OPINIONS

When the Statute of the Court was being drafted by the Advisory Committee of Jurists at The Hague, in 1920, a distinction was made between advisory opinions on questions relating to existing disputes and advisory opinions relating to points of law. Mr. Root is reported to have been "opposed to the Court's having the right to give an advisory opinion with reference to an existing dispute"; in his opinion this was "a violation of all juridical principles."⁸¹ But he is also reported to have been convinced by an argument of Professor de Lapradelle that the Council of the League might send to the Court a dispute which had been submitted to the Council "but which ought to have been settled by judicial means." The Advisory Committee included in its draft the following text for a proposed Article 36:

The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.

When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

The Committee's report, accompanying this draft, envisaged opinions "in the abstract" on "theoretical questions"; but it also expressed the conclusion that whenever "an existing dispute is in question, the Court must take its decision in the same manner as if an action had actually been brought before it, that is to say, a judge of the nationality of each of the contesting parties must be allowed to take his place on

⁸¹ *Proceedings of the Advisory Committee of Jurists*, p. 584. It is unfortunate that the report does not give Mr. Root's exact words, which in view of our American experience must have been more guarded. Cf. Ellingwood, *op. cit.*, pp. 180 *et seq.*

the Bench, if the parties request it, and the parties must be allowed to present all arguments and proofs just as in a case brought directly before the Court by them.”⁸²

When the proposed article came before the First Assembly of the League of Nations, in 1920, the Argentine delegation proposed that the competence to request an advisory opinion be given to the government of each member of the League.⁸³ The Director of the International Labor Office proposed that the competence to request an advisory opinion be given to the Governing Body of the International Labor Office and to the International Labor Conference, and that, when the question submitted related to labor, it should be handled by a special commission of the labor section of the Court.⁸⁴ The Italian delegation proposed the deletion of the last paragraph of Article 36,⁸⁵ and M. Ricci-Busatti expressed the opinion that “in practice it would be impossible for the Court to draw a distinction between the cases contemplated in the second and third paragraphs of Article 36.”⁸⁶ M. Fromageot of the French delegation went so far as to regret “that the Covenant gave to the Court advisory capacities.”⁸⁷ The result was a decision of the Third Committee of the Assembly, later accepted by the Assembly itself, to suppress the proposed Article 36 altogether.⁸⁸ As it was finally promulgated by the Protocol of Signature,⁸⁹ the Statute of the Court contains no reference to advisory opinions, therefore.

⁸² *Proceedings of the Advisory Committee*, p. 731.

⁸³ *Records of the First Assembly*, Meetings of Committees, i, 519. Cf. President Harding's proposal in his address at St. Louis, on June 21, 1923, quoted in *Amer. Jour. Int. Law*, xvii, 522. For the author's comment, see *Amer. Bar Assn. Jour.*, x, 16.

⁸⁴ *Records of the First Assembly*, Meetings of Committees, i, 563.

⁸⁵ *Ibid.*, p. 499.

⁸⁶ *Ibid.*, p. 387. But Dr. Scott has referred to it as a “very happy analysis of the situation.” See Scott, *Report and Commentary on the Project of a Permanent Court of International Justice*, p. 112.

⁸⁷ *Records of the First Assembly*, Meetings of Committees, i, 387.

⁸⁸ *Ibid.*, p. 401.

⁸⁹ Judge Moore has referred to the Statute as “not merely the act of the Assembly.” *Publications of the Court*, Series D, No. 2, p. 383. But it would seem that the Assembly made no effort to give operative effect to the Statute. It is through the Protocol of Signature that the Powers have breathed life into it.

RULES OF COURT OF THE PERMANENT COURT OF
INTERNATIONAL JUSTICE

So it became necessary for the judges to deal with the subject in connection with their framing of the rules of court, at the first preliminary session of the Court. When the question first arose, Judge John Bassett Moore submitted an elaborate memorandum⁹⁰ on "the question of advisory opinions," which he stated had proved to be the most "baffling" question connected with the organization of the Court. This memorandum served as a basis of the later discussion, and therefore has an important place in the history of the topic. But the discussion took its direction in some degree from the questions raised and the proposals made.

The Court's committee on procedure⁹¹ drew a questionnaire which asked whether secret advisory opinions might be given to the Council or Assembly of the League, whether the Court might refuse to give opinions requested, and whether opinions might be reserved until the question involved arose in a concrete case.⁹² Though the committee proposed tentative rules to cover these points,⁹³ it was decided that answers to some of them were not necessary.⁹⁴ The proposals made to the Court with reference to advisory opinions had varied greatly.⁹⁵ The proposal of Deputy Judge Negulesco that advisory opinions should be given by a general meeting of the Court, including judges and deputy judges,⁹⁶ seems to have given most difficulty, and doubtless affected some of the approaches made to the whole subject; eventually this proposal was defeated by a vote of seven to five.⁹⁷

⁹⁰ *Publications of the Court*, Series D, No. 2, p. 383.

⁹¹ See the description of this Committee by Å. Hammarskjöld, *supra*, *Harv. Law Rev.*, xxxvi, 704, 708.

⁹² *Publications of the Court*, Series D, No. 2, p. 292.

⁹³ *Ibid.*, p. 307.

⁹⁴ *Ibid.*, p. 98.

⁹⁵ See the draft prepared by the Secretariat, Series D, No. 2, pp. 268-270, and the draft prepared by M. Altamira, *Ibid.*, p. 280.

⁹⁶ See *Ibid.*, pp. 162-165, 476-480.

⁹⁷ *Ibid.*, p. 165.

Judge Moore's memorandum concluded with a statement of ten propositions submitted for the consideration of the judges.⁹⁸ These conclusions are interesting as indicating the approach of a great American lawyer to the question of advisory opinions, and they deserve careful study. Judge Moore started with a conclusion that, in view of the divergence between the two official texts of Article 14 of the Covenant, the obligation to render advisory opinions unconditionally and on request has not been imposed on the Court. This seems to have been the final view of the judges, though it finds only indirect expression in the rules.⁹⁹ Judge Moore also concluded that the giving of advisory opinions of non-obligatory force is not an "appropriate function of a court of justice," and indeed is at variance with the "fundamental design of the Permanent Court of International Justice." He feared therefore that the giving of opinions "avowedly having no binding force" would tend to change the character of the Court.¹⁰⁰ It may be difficult to define just what is an "appropriate function of a court of justice." It has been seen that Anglo-American legal history would hardly bear out the conception that courts of justice can act only in controverted cases.

Judge Moore seems to have been greatly influenced by the thought that advisory opinions of the International Court have no binding force. It is true that such opinions do not call for action as a judgment of the Court calls for action. But they do constitute a formulation of law and opinion which carries with it great moral authority. And to this

⁹⁸ *Publications of the Court*, Series D, No. 2, p. 397.

⁹⁹ Article 74 of the rules of court refers to "any advisory opinion which may be given."

¹⁰⁰ Judge Moore later said that the giving of advisory opinions "obviously is not a judicial function." See John Bassett Moore, "The Organization of the Permanent Court of International Justice," *Columbia Law Rev.*, xxii, 497, 507. Professor Thayer made a similar statement. See James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harv. Law Rev.*, vii, 129, 153. And Judge Cardozo has recently repeated it in *Matter of State Industrial Commission*, 224 N. Y. 13, 16; 119 N. E. 1027, 1028 (1918). See also Scott, *Report and Commentary on the Project for a Permanent Court of International Justice*, p. 111.

extent it would seem that they have some binding force. The advisory opinions which have been given to date do not seem to have had the effect of obscuring or changing the character of the Court.

Judge Moore also concluded that the giving of advisory opinions would diminish the opportunities for the exercise by the Court of its judicial functions in controverted cases, and would thus prevent the Court from contributing through its jurisprudence to the development of international law. But it is difficult to see why advisory opinions of the International Court cannot in themselves be contributions to international law, and the opinions rendered to date would seem to have made very substantial contributions. Judge Moore was solicitous that the Court should not seem to invite requests or applications for advisory opinions, and he preferred that there should be no special regulation concerning advisory opinions, but that the Court should deal with each application as it should be presented according to the nature and merits of the case. He has since explained that the rules of court adopted were based on this view,¹⁰¹ and his later opinion was that the rules adopted "assimilate the process as far as possible to a judicial proceeding, and exclude any supposition that advisory opinions may be rendered in a diplomatic sense and without publicity."¹⁰²

The result of the work of the Court was the adoption of Articles 71-74 of the rules of court.¹⁰³ By providing in Article 73 that notice of a request for an advisory opinion shall

¹⁰¹ See John Bassett Moore, *supra*, *Columbia Law Rev.*, xxii, 497, 508. In an address at Columbia University on February 12, 1924, Judge Moore is reported to have said: "An advisory opinion is not necessarily conclusive. There is an implication that the parties are not legally bound to follow it." *International Conciliation*, No. 197, April, 1924, p. 105.

¹⁰² This seems to be the view of Secretary Hughes, also. See *Proceedings American Society of International Law*, 1923, p. 84.

¹⁰³ "Article 71. Advisory opinions shall be given after deliberation by the full Court.

"The opinions of dissenting judges may, at their request, be attached to the opinion of the Court.

"Article 72. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the

be sent to the members of the League of Nations and to the states mentioned in the Annex to the Covenant, as well as to any international organizations likely to be able to furnish information, the Court has quite clearly raised the advisory opinion out of the character of ordinary legal advice, and has placed it on a judicial basis. The provision in some respects is like the recent Alabama statute which authorizes the justices of the Supreme Court to request briefs from the attorney-general and to receive briefs from "other attorneys as *amicus curiae*." If a provision of this sort had been put into the Missouri Constitution of 1865 or adopted by the Supreme Court of Missouri in execution of the constitutional provision of 1865, it seems probable that the history of advisory opinions in Missouri would have been very different. The provision in Article 74 of the rules of court that advisory opinions are to be printed and published in a special collection furnishes the necessary notoriety for the juridical character of opinions given. Under this rule, the publications of the Court include Series B, in which eight numbers have already appeared; this is a distinctive series published in the same form as Series A, which includes only judgments of the Court. It is notable that the Missouri Constitution of 1865 provided that advisory opinions should be "published in connection with the reported decisions of the Supreme Court." The Colorado Constitution contains a similar provision.

President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.

"The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

"Article 73. The Registrar shall forthwith give notice of the request for an advisory opinion to the members of the Court, and to the Members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant.

"Notice of such request shall also be given to any international organizations which are likely to be able to furnish information on the question.

"Article 74. Any advisory opinion which may be given by the Court and the request in response to which it was given, shall be printed and published in a special collection for which the Registrar shall be responsible."

See also Article 28 of the rules of court.

ADVISORY OPINIONS OF THE PERMANENT COURT OF
INTERNATIONAL JUSTICE

These rules seem to justify the conclusion of Judge Moore that the process of giving advisory opinions has been assimilated "as far as possible to a judicial proceeding."

In the first two years of its history, the Permanent Court of International Justice has been called upon for advisory opinions in eight cases. The fact that so many requests for advisory opinions have been made seems to be some proof of the need for a jurisdiction of this kind in the post-war world.¹⁰⁴ The first three requests for advisory opinions related to constitutional difficulties which had arisen in the functioning of the International Labor Organization.¹⁰⁵ This is the kind of service which may prove very useful in connection with the progress of international organization through the League of Nations and such other bodies as the Universal Postal Union and the International Institute of Agriculture.

The first question called for the Court's interpretation of a provision in the Labor part of the treaties of peace, requiring the governments, when nominating non-government delegates to the International Labor Conference, to consult the most representative organizations of employers and work people. When the Netherlands government chose the workers' delegate to the first and second sessions of the International Labor Conference, it had consulted the Netherlands Confederation of Trade Unions, an organization having a larger membership than any other. But in choosing a workers' delegate to the third International Labor Conference, the Government consulted other organizations whose combined membership was larger than that of the Netherlands Confederation of Trade Unions. This latter organization then protested to the Conference. But the Conference accepted the credentials of the delegate thus appointed, and

¹⁰⁴ See the author's prognosis in "The Permanent Court of International Justice," *Harv. Law Rev.*, xxxv, 245, 261.

¹⁰⁵ See the comment of Å. Hammarskjöld, *supra*, *Ibid.*, xxxvi, 704, 717-722; and the author's comment in *Amer. Jour. Int. Law*, xvii, 18-23.

decided to ask the Governing Body of the International Labor Office to request the Council of the League of Nations to seek the Court's opinion as to the proper interpretation of the article.

When the question came before the Court at its first regular session on June 15, 1922, briefs were submitted on behalf of the Netherlands government, the International Labor Office, and the Netherlands General Confederation of Trades Unions. Oral arguments were heard on behalf of the British and Netherlands governments, the International Federation of Trades Unions, the International Federation of Christian Trades Unions, and the International Labor Office. On July 31, 1922, the Court gave the unanimous opinion that the Netherlands government's nomination had complied with Article 389 of the Treaty of Versailles.¹⁰⁶ This opinion put an end to a controversy which had existed since the beginning of the International Labor Organization, and its general acceptance has added to the efficiency of the International Labor Conference since.

The second question before the Court related to the competence of the International Labor Organization to deal with questions as to agricultural labor. The International Labor Conference had declared itself competent to deal with such questions, had in fact adopted measures relating to agricultural labor. But the French government asked the Council to request the Court for an opinion. When the question came before the Court, arguments were heard on behalf of the British, French, Portuguese, and Hungarian governments, and on behalf of the International Agricultural Commission, the International Labor Office, and the International Federation of Trades Unions. On August 12, 1922, the Court gave the opinion, two judges dissenting, that the competence of the International Labor Organization does extend to the conditions of labor of persons employed in agriculture.¹⁰⁷ This opinion has very effectively put an end to the discussion.

¹⁰⁶ *Publications of the Court*, Series B, No. 1.

¹⁰⁷ *Ibid.*, No. 2.

While this second question was being considered by the Court, the French government sought the Council, to request an opinion on a somewhat related question, whether the International Labor Organization is competent to deal with proposals concerning the methods of agricultural production. When the question came before the Court, arguments were heard on behalf of the French government and the International Labor Office, and on August 12, 1922, it expressed the unanimous opinion that, while the general power to deal with "means of production" had not been given to the International Labor Organization, it is competent to consider the effect upon production of measures which it may seek to promote for the benefit of the workers.¹⁰⁸ The Court insisted on dealing with only so much of the question as was specific and definite, and declined to deal with competence as to "other questions of a like character."

The fourth question before the Court related to the nature of a dispute between France and Great Britain with reference to certain nationality decrees promulgated by France in Tunis and Morocco (French Zone). When this dispute was brought before the Council of the League of Nations by the British government, the French contention was that the Council was not competent to deal with it because the nationality question involved was a matter of solely domestic jurisdiction (under Article 15 of the Covenant). The Council decided that it should be left to the Court to say whether this was true, and the two governments agreed that if the Court should say that the question was not a matter of solely domestic jurisdiction, the whole dispute would be submitted to arbitration or adjudication. The matter came before the Court as a request for an advisory opinion, though it was treated very much as if it had been a contested case. The British and French governments submitted "cases" and "counter-cases," and their counsel argued before the Court precisely as they would have done if they had been parties.

¹⁰⁸ *Publications of the Court*, Series B, No. 8.

But in the opinion handed down at the extraordinary session, on February 7, 1923,¹⁰⁹ the Court very scrupulously confined itself to the nature of the dispute and insisted that it was not dealing with the merits. The Court was unanimous in expressing the opinion that the dispute involved questions which were not by international law solely within the domestic jurisdiction of France. One indication that the Court was not just giving legal advice in expressing this opinion, is the fact that Judge Weiss, of French nationality, joined in thus repudiating the position solemnly taken by the French government. With a whole network of treaties relating to the French protectorates in Tunis and Morocco, the Court was forced to say that an international question was involved, though questions of nationality would ordinarily fall within domestic jurisdiction.

When this opinion was announced, the French government immediately declared its acceptance of the conclusions, and its desire to have the Court deal with the dispute on its merits. But before the next meeting of the Court, an agreement had been reached between the British and French governments which made further proceedings unnecessary.¹¹⁰

The fifth question before the Court related to a dispute between Finland and Soviet Russia with reference to the latter's alleged failure to execute an agreement to accord autonomy to the Finnish population of Eastern Carelia. When Finland found herself wholly unable to get any satisfaction from the Moscow authorities, she had appealed to the Council of the League of Nations. But the Soviet government refused the mediation of the latter body, which finally, at Finland's insistence, asked the Court for an opinion whether certain declarations made by the Soviet authorities at the Peace Conference of Dorpat had placed Russia under an interna-

¹⁰⁹ *Publications of the Court*, Series B, No. 4. See Manley O. Hudson, "The Second Year of the Permanent Court of International Justice," *Amer. Jour. Int. Law*, xviii, 1; Robert Ruzé, "Le Différend Franco-Britannique," *Revue de Droit International et de Législation Comparée* (3d ser.), iv, 597.

¹¹⁰ See League of Nations, *Treaty Series*, xviii, 305 (1923). For comment, see William Latey, "The Anglo-French Tunis Dispute," *Grotius Soc. Trans.*, ix, 49.

tional obligation. When the Court became seised of the question, an opportunity was given to Finland and Soviet Russia to argue the question, but M. Tchitcherin on behalf of Soviet Russia was quick to spurn it. The Court was then confronted with determining whether the question before it could be answered in the face of this refusal of the Russians to appear. When it was determined that "answering the question would be substantially equivalent to deciding the dispute between the parties," it was of course necessary to say that no opinion would be given in the absence of some kind of submission of the dispute itself by the parties. This refusal to give an opinion¹¹¹ was accompanied by the declaration that "the Court, being a court of justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a court." After this action, it can hardly be doubted, even if it was not already clear, that the new Court is a thoroughly independent judicial tribunal, manned by judges conscious of the limitations that surround judicial action.

The sixth question submitted to the Court related to measures taken by Poland to oust certain Prussian colonists, who had been sent into the territory by the German government, and whose titles to the land they occupied had not been made definitive before the end of the fighting in November, 1918. Appeals by the German colonists had been lodged with the Council of the League of Nations, under the Minority Treaty between the Principal Powers and Poland,¹¹² and the Council sought from the Court an opinion as to its competence and as to the extent to which measures taken by Poland had been in conformity with her international obligations. The Court heard arguments by an agent of the German government and by a former attorney-general of Great Britain who acted on behalf of the Polish government. In

¹¹¹ *Publications of the Court*, Series B, No. 5. The refusal was published in the collection of advisory opinions, and is referred to by the Court itself as an "opinion."

¹¹² The text of this treaty has now been published in *U. S. Treaties and Conventions*, iii, 3714.

a unanimous opinion handed down on September 10, 1923,¹¹³ it was found that the German settlers had possessed equitable interests in their holdings which the German government had power to convert into legal interests until the Treaty of Versailles came into force. The Polish government was therefore found to have violated its international obligations in the measures which it had taken, and the Council was so advised.

When the question was again raised in the Council of the League of Nations, it is interesting to note that Poland accepted the opinion of the Court and undertook to discontinue all ouster proceedings and to reimburse the settlers as to whom such proceedings had already been carried out.¹¹⁴

The seventh question to be submitted to the Court also involved Poland's obligations under the Minority Treaty. A clause in that treaty conferred Polish nationality on certain persons who were born on Polish territory of parents habitually resident there at the time. The Polish government began to treat as German nationals such persons whose parents were not also resident in Poland on January 10, 1920, when the Treaty of Versailles went into force; that is, it refused to concede Polish nationality to certain individuals of German origin born in Poland of parents resident there at the time of their birth, unless they could also show that their parents were resident there on January 10, 1920. The question was first taken to the Council of the League of Nations by the Germanic minority in Poland, and the Council sought the opinion

¹¹³ *Publications of the Court*, Series B, No. 6. It is notable that Poland was not invited to name a judge *ad hoc* to sit in this case, though no Polish national is among the regular judges. This precedent is doubtless to be followed, and it is clear that a state affected by an advisory opinion is not a "party" within the meaning of that term in Article 31 of the Statute. Yet it is to be noted that the Advisory Committee of Jurists had stated in its report that whenever "an existing dispute is in question, the Court must take its decision in the same manner as if an action had actually been brought before it, that is to say, a judge of the nationality of each of the contesting parties must be allowed to take his place on the Bench, if the parties request it. . . ." *Proceedings of the Advisory Committee*, p. 731.

¹¹⁴ See *League of Nations Off. Jour.*, 1923, pp. 1334, 1489; *Ibid.*, 1924, pp. 406-408. For a criticism of the Court's opinion, see H. H. L. Bellot, "Colons Allemands en Pologne," *Journal du Droit International* (Clunet), li, 321.

of the Court both with reference to its own competence and with reference to the proper interpretation of the provisions of the Minority Treaty. The Court heard argument by counsel for both Poland and Germany, and on September 15, 1923, it gave a unanimous opinion that the Council of the League of Nations was competent to deal with the matter and that Poland was improperly requiring residence of parents on January 10, 1920, as a condition of acquiring Polish nationality.¹¹⁵

The eighth question to come before the Court related to the determination of the boundary between Poland and Czechoslovakia in the Spisz territory — the so-called Jaworzina question. This dispute had raged since the Peace Conference at Paris. It was first decided to take a plebiscite in the Spisz area, but so many difficulties developed that at the Spa Conference in July, 1920, the plebiscite arrangements were suspended. Thereafter, a frontier line between Poland and Czechoslovakia was drawn by the Conference of Ambassadors at Paris and accepted by representatives of the two countries. Various efforts to reopen the question led to fruitless discussions in the Conference of Ambassadors, covering a period of three years. Finally, the Conference handed the question over to the Council of the League of Nations, with a suggestion that the Court's opinion might be sought on the legal question as to the definitive character of the Conference's decision of July, 1920. Poland and Czechoslovakia were both represented by counsel when the Court began to consider the matter. On December 6, 1923, the Court handed down a unanimous opinion,¹¹⁶ to the effect that the settlement of 1920 had been definitive and should be applied in its entirety.

¹¹⁵ *Publications of the Court*, Series B, No. 7. See also *League of Nations Off. Jour.* 1924, p. 405.

¹¹⁶ *Publications of the Court*, Series B, No. 8. See also *League of Nations Off. Jour.*, 1924, pp. 356, 398.

RESULTS OF TWO YEARS' EXPERIENCE

This two years' experience of the Court in handling eight requests for advisory opinions seems sufficient for some conclusions to be drawn as to the usefulness of the device and the way in which it will probably be used in the immediate future. It is notable that in all eight of the cases, the question has been put with reference to a problem calling for action. The "solemn occasion" required by American constitutions has existed, to the extent that in each case the Council was faced with a problem demanding solution. It did not at any time present a "theoretical question," for "academic discussion" by the Court, as had been feared; but in each case it sought an authoritative determination of the law to guide some action that had to be taken.¹¹⁷

The Court has assiduously confined its opinions to the definite issues placed before it by the Council. It is notable, in this connection, that the Council failed to ask the Court for an opinion on the questions which arose in connection with the Italo-Greek dispute in 1923,¹¹⁸ though such a course was proposed.¹¹⁹

Moreover, the Court has acted in each instance only after the fullest opportunity for hearing and argument, given to each interest specially affected. In every case, some government representative has argued the question, and in several instances non-governmental associations have been represented. By the refusal to give an opinion on the Eastern Carelia question, also, the Court has indicated that it will safeguard its opinions against the possibility of inadequate argument. The thoroughness of the arguments before the Court has enabled each of the opinions given to be put into

¹¹⁷ Cf. Answer of the Justices to the Senate and House of Representatives, 217 Mass. 607, 612; 105 N. E. 440, 441 (1914).

¹¹⁸ See *League of Nations Off. Jour.*, 1923, p. 1351.

¹¹⁹ By Lord Robert Cecil, representative of the British Empire. *Ibid.*, pp. 1320, 1331. M. Salandra opposed Lord Robert Cecil's proposal by pointing out that the Council had asked for advisory opinions "in concrete cases only and not in abstract questions."

its international setting, and in this way the work of the Court has a constructive quality. Each of its opinions has been a distinct contribution to international law. This is particularly true of the two advisory opinions relating to the execution of the Minorities Treaties.

All of the advisory opinions have been the conclusions of the full bench of eleven judges, or a majority of them,¹²⁰ and unlike the usual American practice, they are the opinions of the Court and not of the individuals who compose it.¹²¹ No secrecy attaches to the procedure at any stage, and the opinion is always read in open court and given the notoriety of wide publication.

Under these circumstances, it is difficult to see what the advisory opinions of the Permanent Court of International Justice lack to give them the quality of "judiciality" in the full sense of that term.

The record of the Permanent Court of International Justice thus offers opportunity to judge the working of an experiment in international jurisprudence. If the Court should take the narrow attitude toward advisory opinions which was taken by the Supreme Court of Missouri in the decade following 1865, it would be a simple thing to strangle this experiment. Once strangled, the experiment would be said to have failed. On the other hand, if the Court continues to show the attitude evidenced both in drawing up the rules and in dealing with eight requests for opinions in the first two years, the experiment will have a chance to succeed, and the device may possibly prove very useful to our international society. It is to be hoped that the Court will not stultify itself by rigid limitation, that it will not cast its process in the mould of a common-law writ of ejectment. It is too early to say what is an appropriate function of the new Court until we watch this experiment for a time. To date, the indications are all in its favor.

¹²⁰ There was dissent in only two cases.

¹²¹ This difference seems to have been greatly over-emphasized in America. *E. g.*, *Loring v. Young*, 239 Mass. 349; 132 N. E. 65 (1921).

Certainly, one thing is clear. The device should not be thrown away until we have had time to see how it may be made to work.¹²² A political shibboleth, built upon an American conception of separation of powers, should not be permitted to wreck a sound experiment launched in a world which is but slowly emerging from the bankruptcy of the war.

¹²² The suggestion of President Harding, in an address at St. Louis on June 21, 1923, that this jurisdiction be abolished was therefore unfortunate. See *Amer. Jour. Int. Law*, xvii, 522. Equally unfortunate is the statement in the report of the majority of the Committee on Foreign Relations of the U. S. Senate, of May 27, 1924, to the effect that the jurisdiction of the Court to give advisory opinions is "believed by the committee to be a highly dangerous and undesirable jurisdiction." 68th Cong., 1st Sess., Senate Report No. 634, p. 3. Cf. President Coolidge's message to Congress, *New York Times*, December 4, 1924, p. 8.

THE QUESTION OF AMERICAN
PARTICIPATION

VI

AMERICA'S RELATION TO THE COURT ¹

THE president of the New York State Bar Association, Mr. William D. Guthrie, in his annual address on January 20, 1922, has put an important challenge to American lawyers. He has raised a question for which the American bar cannot escape responsibility: when and how shall the United States act to give its support and approval to the new Permanent Court of International Justice?

Mr. Guthrie put the issue as follows:

It is true that the United States has not yet been pledged formally to have resort to this new International Court of Justice; but after our long and leading record of advocacy of such a judicial tribunal among nations — in fact, our delegation was the only one instructed to lay the project before the Peace Conference at The Hague in 1907 — it is surely improbable in the extreme that we shall continue to refrain from direct endorsement, support and participation.²

Leaders of the American bar have played an important part in the movement which, after two decades, has culminated in the Court which held its first meeting at The Hague on January 30, 1922. To go back no further than the Hague Conference of 1907, it was Mr. Joseph H. Choate, Mr. Uriah M. Rose, and Mr. David Jayne Hill who laid before that Conference America's proposal for a Court of Arbitral Justice to supplement the panel set up by the 1899 Conference as the Permanent Court of Arbitration. It was another American lawyer, Mr. Robert Lansing, who urged the American idea of an international court at the Paris Peace Conference.³ It was Mr. Elihu Root who, as a member of the Com-

¹ Reprinted, with slight revision, from the *Amer. Bar Association Journal* for February, 1922.

² *New York Law Journal*, lxvi, 1401; *Reports of New York State Bar Assn.*, xlv, 146.

³ Lansing, *The Peace Negotiations* (1921), c. xi.

mittee of Jurists set up by the Council of the League of Nations in 1920, devised the structural scheme of the present Court, which, as Mr. Root has told us, "was taken very largely from the experience of the government of the United States."⁴ Mr. Root's suggestion made possible the compromise which enabled agreement to be reached on a method for selecting the judges of the Court — the compromise between the equality of the small powers and the hegemony of the great powers. Finally, it is our foremost authority on international law, Mr. John Bassett Moore, who took his place on the international woolsack at The Hague on January 30, 1922. Throughout the recent history of the efforts to establish machinery for the administration of international justice according to law, leaders of the American bar have been in the forefront.

But what part do American lawyers propose to play, now that the Permanent Court of International Justice is actually in being and has begun its sittings? Shall the United States continue to lead in this extension of the field of law? Shall emphatic endorsement and support be given to this culmination of American effort? Or do we propose to sit supinely by as disinterested spectators while John Bassett Moore and his ten colleague judges labor through the troubled first years of the Court's existence in uncertainty and doubt? It may be that the Court will succeed without the aid of the United States. Thirty-one states have ratified the protocol embodying its Statute, and fourteen more states have signed it. It will probably be but a short time before all the fifty-one members of the League of Nations have ratified. But the forces working for international isolation and disintegration may yet undermine the prestige and strength of the new Court. And the influence of America might tip the scales for its abandonment or perpetuation. What then does America propose to do about this "great and noble experiment," as Mr. Guthrie has characterized it?

⁴ Root, *Men and Policies* (1924), p. 393.

It is unnecessary to argue the general acceptability of the Statute of the new Court. Lawyers throughout the world have greeted it with glad acclaim, and the exposition and explanation of its place and functions have been replete. The address of Mr. Root before the New York State Bar Association on his return from The Hague,⁵ the address of the Solicitor-General of Great Britain before the Trinity College Law Society last February,⁶ Dr. James Brown Scott's editorials in the *American Journal of International Law*,⁷ and Dean Wigmore's jubilation in the *Illinois Law Review*⁸ — all of these are but indications of the universal rejoicing of lawyers that this "dream of the ages" should have been "realized in our time."

But the question arises as to the possibility of the United States giving its formal support, in view of the existing political situation and particularly the American abstention from the League of Nations. How might the United States coöperate in maintaining the new Court? And to what degree would such coöperation involve the United States politically? Mr. Guthrie told the New York Bar State Association:

We can give that support and join the other forty-five or more nations by simply signing the protocol accepting the Court and agreeing to contribute our share of the cost of maintenance, without committing ourselves thereby, directly or impliedly, to the League of Nations as at present constituted, or assuming any of its responsibilities.

American lawyers may want to inquire more precisely as to the effect of signing the protocol, and Mr. Guthrie's explanation may therefore bear some elaboration.

The Court does not derive its existence from the Covenant of the League. That instrument stopped with providing that the Council should formulate plans for establishing the Court and should submit them to the members of the League for adoption. The first step of the Council, after its organ-

⁵ Reprinted in the *Amer. Bar Association Journal* for December, 1920, p. 181.

⁶ Reprinted in *Cambridge Law Journal*, i, 29.

⁷ *Amer. Jour. Int. Law*, xv, 260, 556.

⁸ *Illinois Law Rev.*, xvi, 207. See also the author's article in *Harv. Law Rev.*, xxxv, 245.

ization meeting in 1920, was to invite a Committee of Jurists to draw up such plans. It was this Committee on which Mr. Root served, assisted by Dr. James Brown Scott as legal adviser. The project of the Committee was drawn up at The Hague in the summer of 1920,⁹ and was approved with certain modifications by the Council of the League of Nations at Brussels, in October, 1920. It was submitted to the Assembly of the League at its first meeting in November, 1920, and was there carefully studied by a second Committee of Jurists, of which Mr. Charles J. Doherty, Attorney-General of Canada, was a member. Some additional amendments were agreed upon, and on December 13, 1920, by the unanimous vote of the representatives of forty-eight states, the Assembly passed a resolution approving the amended Statute and providing that it should be submitted to the members of the League and other states mentioned in the Annex to the Covenant, through the medium of a protocol to be signed and ratified. The Statute finally came into force when a majority of the members of the League ratified this protocol during the summer of 1921.

The protocol itself provides that it "shall remain open for signature by the states mentioned in the Annex to the Covenant of the League." The United States is one of these states. What then would signature and ratification by the United States involve? Clearly it would in no way affect the position of the United States with regard to membership in the League. The Court protocol is a distinct treaty complete in itself. It derives its force from the independent signature and ratification of more than thirty states. The Statute of the Court does not depend on the political organs of the League, nor upon the Covenant of the League, for its validity and effect. If the United States should sign and ratify the protocol, it would merely be joining in the maintenance of the Court, adding the weight of its influence to the Court's authority. It would not be bound to submit to the Court's

⁹ The original project is reprinted in *Amer. Jour. Int. Law*, xiv, 371.

jurisdiction unless it also signed and ratified an optional clause, attached to the protocol as an addendum, providing for compulsory jurisdiction — the optional clause which has been accepted by eighteen of the forty-five signatory states.¹⁰

The Court is now "open to the members of the League and also to the states mentioned in the Annex to the Covenant." The United States may, therefore, have access to it without signing and ratifying the protocol. It may go before the Court as a plaintiff; or it may consent to being named by some other state as a defendant. In this respect, the situation would not be changed if the United States should sign and ratify the protocol. Access to the Court is open to the United States to-day on the same terms as if the United States had signed and ratified the Court protocol. Why then is it important that the United States government should address itself to the question at all? Three phases of the situation call for attention: (1) the election of the judges; (2) the expense of the Court; and (3) the measure of the Court's authority.

(1) As to the election of the judges, it is to be noted that Americans may now participate in the nomination of candidates to be considered by the Council and Assembly. The nominations are made by the national groups in the Permanent Court of Arbitration as established under the Hague Conventions of 1899 and 1907. In connection with the first election of the judges, Messrs. George Gray, John Bassett Moore, Elihu Root, and Oscar Straus were invited to submit nominations; but although Mr. Root had intimated in his address to the Association of the Bar of the City of New York that such an invitation might be acted upon by the American group,¹¹ it was finally decided that no nominations would be made by them. The nominations of the four Ameri-

¹⁰ On December 1, 1924, the protocol had been signed by forty-eight and ratified by thirty-seven members of the League.

¹¹ In an address before the Association of the Bar of the City of New York on October 21, 1920, Mr. Root said: "My friend, Mr. Straus, whom I see smiling before me, and Judge Gray and Mr. John Bassett Moore and myself will have to

cans whose names were considered in the first election — John Bassett Moore, Roscoe Pound, Elihu Root and James Brown Scott—all came from other countries, therefore. Undoubtedly the American group was influenced in its refusal to make any nominations by the failure of the United States to act upon the Court protocol; they might accept similar invitations in the future, however, though they will be less likely to do so if the United States does not formally endorse the Court.

The judges of the Court are finally elected by the Council and Assembly of the League, acting independently. As the United States has no membership in either body at the present time, it would not become entitled to participate in the election merely by signing and ratifying the protocol. Membership in the Council and Assembly conditions participation in the election of the judges; and is in turn conditioned on membership in the League. The question arises then whether the United States should sign and ratify the protocol establishing a court whose judges would be elected without the formal participation of the United States. It is hardly sufficient that in all probability the elections would be so handled by the Council and Assembly that an American should always be one of the judges. Some formal method for American participation in the election must be worked out, and can this be done short of our entry into the League? Can any sort of reservation be made which would give the United States the desired position? Such a reservation would not be easy to frame. The United States is interested, not only in the election of Americans who might be chosen to sit on the Court, but also in the other judges elected. A thoroughgoing reservation might condition American acceptance on permission for the United States to participate in all the elections held—in the by-elections for filling vacancies

get together and propose two names of men whom we think fit to be judges, and who, we have ascertained in some way satisfactory to ourselves, will probably be willing to serve as judges, and send them on to the secretary." See *Bulletin of the Association*, November, 1920, p. 12.

which may arise, as well as in the general election to be held every nine years. But it would be awkward to ask all the forty-five signatory states to accept an amendment of the Statute to permit the judges to be elected by the Assembly and the Council and the United States.¹²

Of course the United States might simply make a formal declaration, by means of a presidential proclamation authorized by a resolution of the Senate, stating our willingness to coöperate in maintaining the Court, without any signature or ratification of the protocol. Or we might ratify the protocol with a reservation that an American should always be among its judges — though this would obviously set a bad example. Or we might ratify the protocol and Statute with a reservation permitting the United States to reconsider the question at the end of a limited period of time. Perhaps the most satisfactory method would be for the United States to ratify on condition that it might at any time denounce; for the states represented on the Council would doubtless always be willing, in order to prevent such denunciation, to consult our government informally before making the Council's choice of any judge definitive.

All of these alternatives may have to be considered at Washington. At any rate it seems highly improbable that any objection would be taken by the American government to the present personnel of the judges. In no event can more than one national of any country be serving as judge at any one time,¹³ and for the nine years of Judge John Bassett Moore's term, the American incumbency is doubtless satisfactory to our bar.

(2) The expense of the Court is now defrayed out of the general funds of the League of Nations. This includes the salaries of the judges and other officers of the Court, and the administrative expenses of its meetings at The Hague, such as the rent of the Peace Palace. But litigant states must bear

¹² For a statement of the author's later views, see *post*, pp. 192-196.

¹³ This may be thought a slight overstatement of the effect of the second paragraph of Article 10 of the Court Statute.

their own costs; and "when a state which is not a member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court."

At the present time, of course, the United States pays no part of the Court's expenses. It does not even pay the salary of Judge Moore. We are in the position of benefiting from the existence of the Court — we may have access to it at any time — but we let the other states foot the bills. This situation would not necessarily be changed if the United States should sign and ratify the protocol, for neither the protocol nor the Statute contains any provision expressly binding states not members of the League to pay part of the Court's expenses. The Statute does provide that "the expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council"; and if the United States had signed and ratified the protocol, the Council might then decide, with the concurrence of our government, as to the proportion of the Court's expenses to be borne by the United States. The formality would thus be a simple one by which the American people would undertake their share of the small financial burden of maintaining the Court.

(3) The principal effect of America's underwriting the new Court would concern the measure of the Court's authority. The struggle for law as a means of justice is ever a precarious one. At the end of a world war which freshened men's faith in force, the scales are not too rapidly tipped to favor law. It is in many respects an inauspicious time for the Court's inauguration. The international stage is not too well set for dramatic victories of law over violence. Now that we have the new Court in being, it may be months or even years before it is given an important rôle to play. In this respect, its history may follow that of the Supreme Court of the United States, which met for the sixth time before it heard a contested case. For a period, also, even in those instances where states agree to adjudicate their differences,

they may prefer to draw upon the panel of the old Permanent Court of Arbitration which leaves them free to hand-pick their judges. And when important cases are adjudicated in the new Permanent Court of International Justice, questions may arise as to the execution of its judgments. The government of some defeated state may echo Andrew Jackson's "John Marshall has made his decision — now let him enforce it."¹⁴ In short, the path before the new Court gives little promise of being an easy one—the possible political pitfalls may imperil its very existence.

It is important, therefore, that all the world's moral determination be mobilized in support of the new institution. It is important particularly that the influence of the United States — newly strengthened by the war — should be exerted for it. The attitude of the United States toward other court projects debated during the last two decades places an added responsibility on the United States now. Even if the ultimate success of the Court is assured by the soundness of the ideas behind it, the judgment of the world toward it will long be influenced by its record during the next decade or so. This is the period in which its authority needs the backing of its friends.

It may be concluded that the signature and ratification of the Court protocol by the United States would not greatly change the existing situation so far as access to the Court is concerned. It may be difficult to say that the United States would be greatly directly benefited by the course which Mr. Guthrie suggests. But this course does not involve any political entanglements — it involves no obligation to assist in any way in enforcing decisions of the Court. And the only burdens are those which any self-respecting state would seek to share — paying its part in maintaining a very necessary international institution. Yet the significance of America's attitude is very great. It may throw the scales one way or another toward determining what is to be the future of this Court.

¹⁴ See Beveridge, *Life of John Marshall*, iv, 551.

VII

A SUGGESTED METHOD OF AMERICAN PARTICIPATION¹

IF there is one feature of American foreign policy that has remained constant during the last half-century it would seem to be our support of the idea of a permanent international court of justice. When Secretary John Hay directed our delegates to the first Hague Conference to propose the establishment of such a tribunal, he traced the growth of an "almost continuous movement of thought in this direction since 1832," when the Senate of Massachusetts had adopted a resolution on the subject;² and it was in no small measure due to the efforts of the American delegates that the panel known as the Permanent Court of Arbitration was set up in 1899. Eight years later President Roosevelt wanted "to see the Hague Court greatly increased in power and permanency," and Secretary Root instructed our delegates to the second Hague Conference to endeavor "to bring about a development of the Hague tribunal into a permanent tribunal."³ But no agreement could be reached as to the method of selecting the judges, and it has remained for the Permanent Court of International Justice, established during the last two years, to achieve that result. This new Court is quite obviously in line with what our government has been standing for during the administrations of Presidents McKinley, Roosevelt, Taft, and Wilson, and the all but universally favorable comment on its organization seems sufficient indication of its fulfilment of American hopes.

But the government of the United States has had no part in setting up the new Court, and we are now confronted with

¹ Reprinted, with slight revision, from *Foreign Affairs*, an American quarterly review, for December, 1922 (vol. i, pp. 71-82). The footnotes have been added.

² *U. S. Foreign Relations*, 1907, p. 1142.

³ *Ibid.*, p. 1135.

the necessity of deciding what share we shall have in maintaining it. The problem is not without its difficulties, and these must be clearly understood if the administration is to have the assistance of an informed opinion in meeting them.

Secretary Hughes has called attention to the fact that under the present constitution of the Permanent Court of International Justice the United States has no voice in the election of the judges. In a statement on July 13, 1922, he declared that he saw "no prospect for any treaty or convention by which we should share in the maintenance of the Court until some provision is made by which, without membership in the League, this Government would be able to have an appropriate voice in the election of the judges."⁴ In his address at Boston on October 30, 1922, he was more hopeful, for he stated his belief "that suitable arrangements can be made for the participation by this government in the election of judges of the International Court which has been set up, so that this Government may give its formal support to that Court as an independent tribunal of international justice."⁵

If these statements may be taken as a considered formulation of the policy of the government of the United States with reference to the new international Court, they are significant for two reasons. They seem to admit the general acceptability of the plan and organization of the Court, as well as the desirability of American coöperation in maintaining it; while they set a condition precedent to such coöperation which most of the Americans who are interested in the subject at once recognize to be proper and requisite. It is no longer necessary, therefore, to argue the general question of American acceptance of the new Court as being in line with the policy which our government has consistently followed for the last quarter of a century. The Secretary of State has invited the discussion to be shifted to the precise measures by which American coöperation in maintaining the existing

⁴ *New York Times*, July 15, 1922, p. 1.

⁵ *Ibid.*, October 31, 1922, p. 4.

Court can be effected; and the condition which he sets formulates a concrete and immediate problem, toward the solution of which it may be hoped that discussion will contribute.

The establishment of the Permanent Court of International Justice is one of the triumphs of international coöperation since the war. The Peace Conference had made no attempt to satisfy the demand, so often heard during the war, for a "real" international court. The task was too delicate for a post-war Paris. So the Covenant of the League of Nations stopped with providing that the Council should "formulate and submit to the members of the League for adoption, plans for the establishment" of a court competent to deal with "any dispute of an international character which the parties thereto submit to it." At its first meeting for the transaction of business the Council of the League proceeded to set up a committee of jurists, which included Mr. Elihu Root, to draft a project for the Court. The deliberations of this Committee continued through the summer of 1920, and before the end of that year its project had been approved, with some amendments, by both the Assembly and the Council. The final plan was then embodied in a statute which was adjoined to a formal "protocol of signature."

This protocol establishing the Statute of the Court has now been signed by forty-six states, of which thirty-five have deposited their formal ratifications.⁶ It is a distinct instrument, resting on its own independent basis, and deriving its operative force neither from the Covenant nor from any action by the Assembly and Council of the League but from the formalities of its own execution and ratification. It even goes beyond the terms of Article 74 of the Covenant, both in its provisions for the Court's jurisdiction and in its provision for the participation of states not members of the League of Nations. As it exists, therefore, the Court is a quite independent body, though it is in many respects de-

⁶ On December 1, 1924, the protocol had been signed by forty-eight and ratified by thirty-seven members of the League of Nations.

pendent on the continued existence of the machinery of the League, and indeed is itself a part of that machinery. Being set up by an independent treaty, its functioning cannot be controlled by the organs of the League, and it would seem to be entirely free from the objections made to the League itself.

The record of the Court already affords some basis for an estimate of its value. The first election of the judges was held in September, 1921, and the foremost American authority on international law, Mr. John Bassett Moore, was made one of the judges. In January, 1922, the Court held its first organization meeting, followed in June by the beginning of its sessions for the hearing of cases. In July and August, 1922, it handed down three advisory opinions on questions submitted to it by the Council, all having to do with controversies relating to the International Labor Organization. On October 2, 1922, a dispute between France and Great Britain over the nationality laws of Tunis and Morocco was submitted to it. And a dispute between various signatories of the Treaty of Versailles relating to the Kiel Canal now seems to be on its way to the Court. So that it has already begun to lay the foundations of a new jurisprudence in international law.

The new Court is not merely a private court of the members of the League of Nations, as one critic has suggested.⁷ From the beginning it has been open to certain states not members of the League. In May, 1922, the Council of the League, acting under power conferred by Article 35 of the Statute of the Court, opened it to all nations of the world, regardless of membership in the League, on condition of the deposit of a declaration accepting the jurisdiction of the Court.⁸ As it exists to-day, therefore, it is a world court open to all the states of the world on terms of equality. It constitutes an important addition to the Permanent Court of Arbi-

⁷ Dr. David Jayne Hill, in the *Amer. Jour. Int. Law*, xvi, 60.

⁸ For the text of the Council's resolution, see *post*, p. 364.

tration and other existing agencies for the pacific settlement of international disputes.

Though the government of the United States has had no part in its establishment, the Court has a distinct relation to the United States; and an understanding of this relation must precede any attempt to consider the methods by which the government of the United States might coöperate in maintaining it. Why is there a need for any formal action by our government such as that referred to by Mr. Hughes? What advantages would it bring to the United States, and to the Court itself? And how may such action be taken speedily and effectively?

In the first place, the Court is open to the United States on the same terms as to states which have signed and ratified the protocol. Article 35 of the Statute provides that the Court shall be open to states mentioned in the Annex to the Covenant. It is by virtue of falling within this description that the United States may take a dispute to the Court if the other party consents, or may consent to be sued in it by some other Power. In this respect the situation would probably not be changed after formal adoption of the Statute by the American government. For it seems improbable that the United States would adopt the optional clause, annexed to the protocol, for accepting "as compulsory *ipso facto* and without special convention the jurisdiction of the Court in conformity with Article 36" of the Statute. In ratifying the Hague Convention of 1907 relating to the Permanent Court of Arbitration, the United States made a reservation protecting its freedom of action;⁹ and recent history has probably brought us no nearer to agreeing to "compulsory jurisdiction." Though fourteen of the thirty-five ratifying states have adopted the optional clause,¹⁰ it has not had the approval of any of the so-called Principal Powers. Action by the American government which did not include the accept-

⁹ For the text of this reservation, see Malloy, *U. S. Treaties and Conventions*, ii, 2247-2248.

¹⁰ On November 1, 1924, twenty-three states had signed the optional clause.

ance of this optional clause, then, would in no way change the existing situation so far as the use of the Court is concerned. The United States would remain free, as it is now, to decide at the time an issue arises whether it will invoke the new Court.

In the second place, although we enjoy with other peoples of the world the privilege of carrying our disputes before the Court and the common advantage of the world's having at hand such machinery for the pacific settlement of international disputes, no part of the expense of maintaining the Court is borne by the government of the United States. For instance, we pay no part of the salary of Judge John Bassett Moore. It is true that the expense is not great. The total expense for 1923, including the salaries of the judges and the rental of the Court's headquarters in the Peace Palace at The Hague, will be somewhat under \$400,000. The Statute provides that this expense is to be borne by the League of Nations "in such manner as shall be decided by the Assembly on the proposal of the Council," and the Assembly has decided that for the present the expense "shall be incorporated in the general budget of the League and paid out of the ordinary funds of the League." But the adoption of the Statute alone would not have the effect of fixing the quota of the United States, for it contains no provision requiring states not members of the League to share in bearing the expense, except with respect to the expenses of particular adjudications in which such states are parties. The quota of the United States would then have to be fixed by a special arrangement between the United States and the Council. This arrangement might provide that our annual contribution could be paid directly to the registrar of the Court, without passing into the general funds of the League. This would follow a precedent set with reference to Germany's contributions to the expenses of the International Labor Organization, which are paid directly to the Director of the International Labor Office, though the expenses of the Organization are met out

of the general funds of the League. The adoption of the Court Statute, followed by such an arrangement, would occasion no embarrassment to the United States, therefore, and would not create any appearance of American support of the League itself. On the other hand, it would relieve the richest nation in the world of the present embarrassment of making no contribution to the support of the world tribunal.

Thirdly, though the United States may now participate in a limited way in the preliminaries of the election of the judges of the Court, we have no voice in their final election, as the Secretary of State has pointed out. This is not so important with reference to the present incumbents, all of whom are outstanding men in the field of international law. The present personnel would seem entirely satisfactory, and it is difficult to believe that Secretary Hughes's statement about American participation in electing the judges was intended to apply in any way to the election which has already been held.¹¹ As the term of office of the present judges will not expire until 1930, no general election is scheduled for eight more years, though vacancies may have to be filled in that interim. The successor to Judge Moore would very probably be an American; but if a future election should result in there being no American among the judges, it would still be open to the United States, under Article 31 of the Statute, to choose an American to sit *ad hoc* in any case in which the United States should be a contesting party. It is not so much a fear that the United States will not be represented on the Court as a desire to participate in choosing the other judges and to have an influence in the election equal to that of any other state, which makes it essential that the United States have a voice in all future elections.

The procedure of the election is not simple. In the preliminary stage, nominations are made by the national groups in the Permanent Court of Arbitration set up by the Hague

¹¹ For a time there was popular talk of American action which would involve a reconstituting of the Court and a new election of judges.

Conventions of 1899 and 1907. The judges are then elected by the Assembly and Council, proceeding independently, from the list of persons thus nominated. The choice is restricted to such persons, except that in case of a deadlock between the two electoral bodies a joint conference of three members from each makes the selection.

In the first stage of this procedure, the United States now has the same voice as have states which have ratified the Court protocol. It is clearly provided in Article 5 of the Statute that the invitation to nominate "persons in a position to accept the duties of a member of the Court" shall be addressed by the Secretary-General "to members of the Court of Arbitration belonging to the states mentioned in the Annex to the Covenant or to the states which join the League subsequently." In 1921 an invitation was sent to the American members of the Court of Arbitration. It is possible that, in view of their having been named under the Hague Convention of 1907, the American members may consider themselves incompetent to go beyond their functions as defined in that Convention.¹² In a letter of July 19, 1922, Mr. Hughes has said of the American failure to nominate in 1921 that "the point was that the American judges had been appointed under the Hague Convention of 1907, and they were asked to take action under another treaty to which the United States was not a party."¹³ But the provisions of the Hague Convention are not restrictive, and the American judges could hardly fail to accede to the expressed wishes of the Secretary of State in this regard. The invitation is transmitted to them through the Secretary of State, and there would seem to be no difficulty about his giving special authority for making a nomination.

American participation in nominating the judges can thus be secured, as things stand now, without any action by the

¹² This position was taken by the members of the American group in the Permanent Court of Arbitration in 1921, but the contrary position was taken in 1923. See *ante*, pp. 92-93.

¹³ See Fosdick, *Secretary Hughes and the League of Nations* (1924), p. 12.

government of the United States with reference to the protocol and Statute of the Court. The four American members of the Court of Arbitration may nominate not more than two Americans, and not more than two persons of a different nationality. The choice of the American nominees would be certain to have great influence on the electoral bodies. Once it is determined that an American is to be chosen, these bodies would be very likely to elect as judge the American preferred by the American members of the Court of Arbitration.

In the second stage of the election procedure — the voting in the Assembly and the Council — the United States now has no part because it has no representation in either body. In naming the Assembly and the Council as the electoral bodies to choose the judges, the Court Statute must refer to these bodies as constituted by the Covenant. It is to be noted that their competence as electoral bodies depends not upon the Covenant but entirely upon the Statute itself.

If the Court is to be used by the United States as need arises, and if we are to give it the coöperation which is essential to its prestige and authority, it is necessary to make some arrangement which will allow us to participate in this second stage of the election. Even if we feel sure that an American will always be one of the judges, and that he will always be the first choice of the American members of the Permanent Court of Arbitration, many Americans would still think it necessary for us to have a direct voice in the selection of the other judges. This involves a change in the existing situation, and Secretary Hughes has formulated the problem which this change would present. How can the United States coöperate in maintaining the Court, having an appropriate voice in the election of the judges, without incurring any of the obligations of membership in the League?

The United States has been invited to sign the protocol to which the Court Statute is annexed. A provision was inserted in the protocol itself that it should "remain open for

signature by the members of the League of Nations and by the states mentioned in the Annex to the Covenant of the League." When the draft of the protocol was presented to the first Assembly of the League, Dr. Hagerup, the *rapporteur*, explained this paragraph by saying: "This means that the United States can adhere to the Statute."¹⁴ Technically, action by the United States might take either of two forms — signature followed by ratification, or adhesion without signature. Perhaps adhesion would be the simpler method to adopt in view of American constitutional procedure; the Senate's consent would then be obtained before any formal action is taken by the Executive. The protocol does not exactly encourage such action, for it is cast as an instrument entered into by members of the League; but an explanatory saving clause would avoid all difficulty.

To meet the election problem some express provision seems necessary. Of course it is possible that the Statute of the Court should be amended. But the general outlines of the present scheme for electing the judges have produced such universal satisfaction that no amendment should be considered which would lead to their abandonment. It would be disastrous to reopen the whole discussion as to the method of electing the judges — the rock which wrecked the plans for a Court of Arbitral Justice in 1907. Mr. Root's greatest contribution to the new Court was his suggestion that the election should be entrusted to the Council and the Assembly. These are, indeed, the only two bodies in existence which reconcile in a practical way the theory of the equality of all states with the actual hegemony of a few. The compromise has given satisfaction to the small Powers by reason of their participation in the Assembly, and to the Principal Powers by reason of their votes in the Council. To upset the present scheme might mean a return to the deadlock of 1907. Any amendment in the Statute, therefore, should keep the present election framework and in some way open up the electoral bodies to the representatives of the United States.

¹⁴ *Records of the First Assembly, Plenary Meetings, p. 441.*

It would not be difficult to frame a general provision for insertion in the Statute which would confer upon states which are mentioned in the Annex to the Covenant and which sign and ratify or adhere to the protocol the same powers and privileges as are possessed by other states invited to sign the protocol by reason of their membership in the League. A provision might easily be drafted, also, which would assure to states named in the Treaty of Versailles as "Principal Powers" participation in the voting in the Council. Such an amendment would leave the electoral power with the Council and the Assembly, but would give to the United States a voice in those bodies when they act outside the Covenant in discharging the electoral function.

It is a less simple matter to plan how such an amendment of the Statute can be put into effect. Unfortunately, the Statute itself makes no provision for its amendment. Nor are the Assembly and the Council empowered to change the independent treaty which the protocol and Statute together constitute. Such competence is conferred upon those bodies neither by the Covenant nor by the protocol; nor was it reserved when, on December 13, 1920, the Assembly passed its resolution approving the Statute and directing the protocol to be opened for signature and ratification. It seems, therefore, that an amendment can be effected only by the same formal processes which were employed in the original promulgation of the Statute. This would mean that a new protocol must be signed and ratified by all of the thirty-five states which have ratified the existing protocol, if not by all of the forty-six states which have signed it. Such a procedure would be both cumbersome and time-consuming. In view of the rôle of the League in establishing the Court, no body outside the League is likely to take the initiative in framing the new protocol. It could be drawn up by the Council of the League, but the Council would probably want the collaboration of the Assembly before promulgating it for signature and ratification. The Assembly will not meet again in

ordinary session until September, 1923. Furthermore, since the treaty-making machinery in most governments now involves some parliamentary action, few governments would find it possible to ratify until the consent of their parliaments had been given. Some parliaments meet infrequently. If the formal action of thirty-five or forty-six governments had thus to be awaited, a change in the Statute of the Court could not be effected for many months or even years.

Moreover, the process of amendment might reopen some of the controversies which the compromises of the existing Statute put at rest. And since the United States is the only country on whose behalf the change would be attempted, the process might draw attention to the peculiar features of the American position in an unpleasant if not an embarrassing manner. It would seem most desirable, therefore, to avoid attempting to secure an amendment to the Statute if provision for the United States to participate in the election can be made in any other way.

Is it possible to obtain the desired result — without changing the existing Statute — by appropriate conditions or reservations to be attached to a ratification of the protocol establishing the Court? A reservation might stipulate that no election should become final until the United States had been consulted; but this might smack of reserving a veto possessed by no other state. Might not the United States ratify or adhere with a reservation that she be admitted to participate in the election of the judges by the Assembly and by the Council when those bodies act, not under any provisions of the Covenant, but as the electoral bodies named in Article 4 of the Statute of the Court? The electoral functions of the Assembly and the Council, as outlined in the Statute, are quite distinct from their general functions as outlined in the Covenant; and participation in the former would in no way involve the United States in the latter. To clinch this point, however, and to erect a buffer for the future, such a reservation might distinctly state that no other obligations are as-

sumed by the United States. If necessary, it could be added that the United States might at any time denounce the protocol and withdraw from further coöperation.

Such a reservation would, of course, require the acquiescence of all the thirty-five states that have ratified the protocol of the Court. But it seems very probable that such acquiescence could be counted upon; and perhaps assurances of it could be secured in advance. It might be effected in the following manner: In line with a provision of the protocol itself, the American ratification or adhesion would be forwarded to the Secretary-General of the League for notification to other states and for deposit in the archives of the Secretariat. If it were desired, the Council of the League might specially authorize the Secretary-General to receive such ratification or adhesion as effective, and this authorization would have a *de facto* if not a *de jure* value for the future. The notification to the signatory states would give them the necessary opportunity to object to the American reservation. It seems most improbable that any state would object. In the absence of objection the reservation of the United States would be established, just as the American reservations to three of the Hague Conventions of 1907 were established. It is difficult to imagine that any challenge to American participation in a future election would be made thereafter. Indeed, it would seem that the American reservation would create a juridical situation as an interpretation of the effect to be given to the language of the protocol itself; for in expressly stating that it should "remain open for signature by the members of the League of Nations and by the states mentioned in the Annex to the Covenant of the League," the protocol must have established some degree of parity between these two classes of signatories.

From the point of view of the other Powers that have ratified the protocol, this procedure could hardly be deemed objectionable. It would not set any dangerous precedent which

might become embarrassing if followed by other states; Ecuador and the Hedjaz are the only other states mentioned in the Annex to the Covenant which are not members of the League, and if Ecuador should seek to ratify, with a reservation that she be permitted to participate in the voting in the Assembly, the other states would probably acquiesce. Of course, the United States would make clear her willingness to negotiate an arrangement regarding her quota of the expenses. This settled, the other Powers would doubtless welcome American coöperation on the terms of the reservation suggested.

If ratification of such reservations is politically possible, it is manifestly simpler than an amendment of the Statute. It would require action by only one legislative body, while amendment might require action by thirty. It is, of course, important to remember that the one body in question is the Senate of the United States. But it seems impossible to devise any satisfactory course which would avoid the necessity for some action by the Senate. Even if we stopped short of taking formal action with reference to the protocol and Statute, if we should merely appropriate money for our quota of the Court's expenses and pass our blessing on Judge Moore's participation in the Court — which seems the least that can be done — still the Senate would have to act. We could not succeed in avoiding a debate on the Statute and protocol at some stage. Nor would merely informal action achieve the result of allowing the United States to participate in the election, unless it were accompanied by action by the other Powers. Some formal action is needed in any event.

A ratification with reservations would not commit the United States to any of the provisions of the Covenant. Article 13 of the Covenant requires members of the League "to carry out in full good faith any award," and this may be interpreted to include decisions of the Court — a committee of the Second Assembly gave it this interpretation in propos-

ing that the meaning should be made clearer by amending the Covenant.¹⁵ But such "sanctions" for the Court's decisions as are to be found in the Covenant are not referred to in the Statute, and in adopting the latter the United States would become in no way bound by the former. It would be a simple matter for a reservation to spell this out, by expressly stating that the United States becomes in no way bound by Article 14, which is the only article of the Covenant expressly mentioning the Court, or by any other article of the Covenant.

It may be concluded, therefore, that the necessity for having a voice in the election of the judges need not preclude immediate action by the United States if we desire to share in maintaining the Permanent Court of International Justice. The conditions set by Secretary Hughes would seem to be fully met if an American representative should sign the Court protocol, with a clear indication that the United States signs not as a member of the League but as a state mentioned in the Annex to the Covenant; and if the President should ratify the protocol, with the advice and consent of the Senate, with reservations (1) that the United States shall enjoy all the privileges enjoyed by any other signatory state and shall be admitted to participate in the voting in the Assembly and the Council when those bodies act, not under any provisions of the Covenant, but as the electoral bodies named in Article 4 of the Statute of the Court; and (2) that the United States does not by this act become in any way a party to, or bound by, Article 14 or any other article of the Covenant of the League of Nations.¹⁶

¹⁵ The amendment to Article 13 of the Covenant came into force on September 26, 1924.

¹⁶ On February 17, 1923, Secretary Hughes wrote to President Harding recommending adhesion to the protocol on certain "conditions and understandings" not inconsistent with these suggestions, as follows:

"I. That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the covenant of the League of Nations constituting Part I of the Treaty of Versailles.

"II. That the United States shall be permitted to participate through represent-

Such a ratification would give the United States a full voice in the election of judges, it would avoid any commitments to the League, and it would greatly enhance the prestige and moral power of the Court for the future. One does not need to be under any illusions as to the importance of courts in the political life of the world to think that a great opportunity is now offered to America, and Secretary Hughes's statement of October 30, 1922, gives promise that it will not be neglected.

atives designated for the purpose and upon an equality with the other States members, respectively, of the Council and Assembly of the League of Nations in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice, or for the filling of vacancies.

"III. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.

"IV. That the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States."—Senate Document No. 309, 67th Congress, 4th Session, p. 7.

VIII

A RÔLE FOR THE UNITED STATES¹

THE task of the peacemakers assembled at Lausanne to draft a treaty with Turkey has been facilitated in many ways by the progress made in international organization since the last great peace with the Turks in 1878. The protection of religious minorities and the "freedom of the Straits" are not new problems, and the failures of attempts to deal with them in the past have been due in some degree to the absence of any international tribunal for handling the difficulties bound to arise in connection with any solution. When the Treaty of Berlin wrested the Balkan territories from the Sultan, elaborate provisions were made for religious freedom; but "putting the Turk out of Europe" soon came to mean, for more than one religious group, the substitution of one oppressor for another. Similarly, through recurring crises the problem of the Straits has remained "a knot which for many long years men and nations have endeavored to untie by all the arts of diplomacy, all the devices of political combinations, and all the violence of wars."² With a competent agency to assist in applying the legislation effected, new provisions for protecting the Christians and a new scheme for "freedom of the Straits" may have better prospect of success.³

No such body was available when the ill-fated Treaty of Sèvres was signed on August 10, 1920, and it was then impossible to do more than make very general provision for meeting future difficulties. But the "public law and system of Europe," in the "advantages" of which the Sublime Porte

¹ Reprinted, with slight revision, from the *Atlantic Monthly* for January, 1923.

² Phillipson and Buxton, *The Question of the Bosphorus and Dardanelles*, p. v.

³ This anticipation was thoroughly realized later, in Article 44 of the Treaty of Lausanne of July 24, 1923, concerning the protection of minorities, and in the Straits Convention signed on the same date.

was admitted to "participate" with such gusto in 1856,⁴ have at last begun to be ordered and organized as a part of the public law and political system of the world; and, in spite of the disillusioning record of failures, other peoples, if not the Turk himself, may hope for some of the promised "advantages" in connection with the forthcoming settlement. Fortunately, the Conference of Lausanne has at hand the Permanent Court of International Justice, and the mere fact of its existence can hardly fail to influence the drafting of the new treaty.⁵

THE STRUGGLE FOR A COURT

The Hague Conference of 1899 succeeded in establishing the Permanent Court of Arbitration; but though it has been successfully used in eighteen cases, this is in reality a panel and not a court. As Mr. Choate pointed out in 1907, the Permanent Court of Arbitration is "a court only in name — a framework for the selection of referees for each particular case."⁶ A determined effort was made at the second Hague Conference in 1907 to establish an additional Court of Arbitral Justice. Secretary Root had instructed the American delegates to endeavor "to bring about a development of the Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility."⁷ The American delegates had the coöperation of the British and German delegates, but the Conference could not agree on any plan for selecting the judges. A scheme for a new court was drawn up, however, and Secretary Knox later sought to have it adopted;⁸ but no final re-

⁴ See the Treaty of Paris of 1856, *British and Foreign State Papers*, xlvii, 8 ff.

⁵ See Articles 44 and 92 of the Treaty of Lausanne of July 24, 1923, and the Declaration relating to the Administration of Justice signed on the same date.

⁶ Scott, *The Hague Peace Conferences of 1899 and 1907*, i, 427.

⁷ See Secretary Root's instructions, *U. S. Foreign Relations*, 1907, pp. 1128 ff.

⁸ *Amer. Jour. Int. Law, Supp.*, iv, 102-114.

sults had been achieved when in 1914 the outbreak of the war necessitated a new beginning.

At the end of the war the pressure for peace did not admit of taking the time necessary for constructing a new scheme for a court. So the Covenant of the League of Nations contains only a provision that the Council shall formulate plans and submit them to the members of the League for adoption. The Council at once invited a number of distinguished jurists to draft a plan. On December 13, 1920, the project drawn up by this Committee of Jurists was unanimously approved, with modifications, by representatives of forty-eight states sitting in the Assembly. A special treaty was drafted, a "protocol of signature"; the plan for the court was annexed to it as a "Statute"; and the protocol was opened to the signatures of all members of the League and of all states (including the United States) named in the Annex to the Covenant as possible "original members of the League." This protocol is an independent treaty, wholly distinct from the Covenant of the League; and as such it has now been signed by forty-six states, of which thirty-five have completed their formal ratifications.⁹

ELECTION OF THE JUDGES

The Committee of Jurists fortunately succeeded in getting over the stumbling-block of 1907 with reference to the election of the judges, by adopting a suggestion which was made by Mr. Root. Every proposal of a scheme for electing the judges in the past had led to a contest between the states which insisted upon the recognition of their own hegemony as Great Powers, and the more numerous states which insisted upon the principle of equality of states.

When the Committee of Jurists met in 1920, two bodies were at hand, the constitution of which is based upon a successful compromise between state equality and the predominance of the Great Powers. In the Assembly of the League

⁹ For an up-to-date list, see Appendix G, *post*, p. 334.

of Nations, each of the small states represented has one vote; in the Council the four permanent members are the "Principal Powers," and the six non-permanent members may also include some of the Great Powers. So Mr. Root proposed, and the Committee of Jurists agreed, that these bodies be utilized as a machinery for electing the judges. The two electoral houses are to act independently, and a majority vote in each is necessary for an election. The existence of the Assembly and the Council thus made possible the adoption of a plan for choosing the judges which has proved acceptable to Great and small Powers alike.

The voting in the Assembly and the Council is restricted in the first instance to a list of persons nominated by the various national groups composing the Permanent Court of Arbitration. Each of these groups may nominate four persons, not more than two of them to be of the group's own nationality. The electors are then directed to bear in mind that the whole Court should "represent the main forms of civilization, and the principal legal systems of the world." At the first election, in September, 1921, the list of nominees included eighty-nine names.¹⁰ As eleven judges and four deputy judges were elected, several ballots were required; but the complicated machinery worked.

ORGANIZATION OF THE COURT

Of the first members of the Permanent Court of International Justice, two are from North America, one from South America, two from Asia, and ten from Europe. All of them have had wide experience as lawyers; eight have been professors of law, and seven are members of the older Permanent Court of Arbitration.

The first session of the Court, which began on January 30, 1922, was devoted to completing its organization. A number of formal matters had to be decided, such as whether the

¹⁰ *League of Nations Off. Jour.*, 1921, pp. 811-818.

judges should wear wigs and robes, and what precedence should be given to judges at state functions.

Sessions of the Court are to be held at least once a year, on June 15, whether there are any cases on its docket or not. The fact that such annual sessions are scheduled should have an important influence in the chancelleries of the world; just as the early meetings of the Supreme Court of the United States were important events in the life of the young Republic, though no contested case was heard until its sixth meeting.

The three questions before the Court at its first session arose out of controversies with reference to the use of the machinery for international labor legislation set up by the treaties of peace; and their sterilized form gives scant indication of the contests from which they issue. Without analyzing the affirmative answers given to the first two questions and the negative answer given to the third, it may be said that the opinions handed down by the Court in July and August have set at rest heated controversies which had menaced the whole future of international coöperation with respect to labor legislation. It is true that the opinion on the second question, as to which a determined contest had been waged between divergent groups in France, was not received without unfortunate recrimination in *Le Temps*; and the most powerful trade-union in Holland was greatly disappointed by the opinion on the first question. But it now seems improbable that any of the three questions will occasion further difficulty, and the coöperation of the fifty-four members of the International Labor Organization¹¹ may continue in harmony.

The Court will soon have an opportunity to exercise a different kind of jurisdiction. Instead of giving opinions which are, in form, advice to the Council, it may be called upon finally to decide a dispute between contesting states.

¹¹ In June, 1924, there were 57 members; see *International Labour Conference, 6th session, Report of the Director*, pp. 11-12.

Great Britain and France now have a controversy over the nationality laws of Tunis and Morocco. It is claimed by the British that France has violated certain treaty obligations in compelling British subjects in Tunis and Morocco to do military service as French citizens. After unsuccessful attempts to secure a reference to arbitration, the matter was laid before the Council of the League; and on October 4, 1922, the Council requested the Court to give an opinion "whether the dispute is or is not by international law solely a matter of domestic jurisdiction," the parties having agreed that, if the Court decides that the matter is not solely of domestic jurisdiction, the whole dispute will be referred to arbitration or to judicial settlement.¹² The jurisdiction of the Court has also been invoked in a dispute between the Allied Powers and Germany, which the Conference of Ambassadors decided to have referred to the Court; this involves the question whether under existing treaty law the Kiel Canal must be kept open to the passage of warships of all nations.¹³

A world court is thus in being! The prophecy of the American delegation to the second Hague Conference—"a little time, a little patience, and the great work is accomplished"¹⁴—is at last fulfilled. But the fulfilment comes only after the world has paid a price for the delay!

EXTENT OF THE COURT'S JURISDICTION

In most cases each party to a dispute must consent before the Court can deal with the dispute. The Great Powers particularly were unwilling to dispense with the special consent to be given in each case. And the United States had taken the same position at both of the Hague Conferences. But an optional clause in the treaty establishing the Court has now

¹² The opinion of the Court was handed down on February 7, 1923, holding that the matter was not one of domestic jurisdiction; France thereupon asked that the Court deal with the dispute on its merits. See *ante*, pp. 48-54.

¹³ This question was formally placed before the Court on January 16, 1923, by the governments of the British Empire, France, Italy, and Japan.

¹⁴ *U. S. Foreign Relations*, 1907, p. 1178.

been ratified by fourteen states,¹⁵ giving the Court jurisdiction of every dispute between these states in which is involved any question of international law, of the interpretation of a treaty, or of a breach of an international obligation. In addition to this, the Court has a large amount of "compulsory jurisdiction" which has been conferred upon it by other treaties. The treaties for the protection of minorities between the Allied Powers and Poland, Czechoslovakia, Roumania, Yugoslavia, and Greece conferred an extensive jurisdiction on the Court, to be exercised without the necessity of consent at the time. Similarly the minority provisions of the treaty of peace with Austria, Bulgaria, and Hungary are to be interpreted by the Court. The sixteen labor conventions adopted by the recent International Labor Conferences, the Aerial Navigation Convention, the Mandates recently drawn up, and the Barcelona Conventions on International Waterways and Freedom of Transit, are to be interpreted by the Court as disputes arise. The treaty of October 10, 1922, between Great Britain and Iraq contains a similar provision. On the whole, therefore, the Court may act in a great many cases without a special agreement to give it jurisdiction.

LAW TO BE APPLIED

When its jurisdiction in a case is established, the Court must find the law to be applied in reaching a decision. The Statute of the Court directs that it apply international conventions, international custom as evidence of a general practice accepted by law, judicial decisions, the teachings of the most highly qualified publicists, and the general principles of law recognized by civilized nations. As if for good measure, the power to decide *ex aequo et bono*, if the parties agree, is expressly added. This has been thought to mean that the Court has power to arbitrate in addition to its power to adjudicate, with reference to a dispute before it; but the lan-

¹⁵ For an up-to-date list of signatures to and ratifications of the optional clause, see Appendix I, *post*, p. 339.

guage probably involves no more than a recognition of the propriety of considering what is "reasonable," or what is "just and good," in cases where the established law is clearly inadequate. For it would seem a mistake to contrast too sharply the processes of arbitration and adjudication. Arbitrations have long proceeded along juridical lines. The recent arbitration agreement between the United States and Norway was not exceptional in providing that the arbitral tribunal should decide "in accordance with the principles of law and equity." Whether a court is arbitrating or adjudicating, it will endeavor to find the law that is applicable. Yet the case seldom arises in which that law can be found full-blown and ready-made. An effort to balance competing interests must always be made, and that is a juridical process when followed by either an arbitral or a judicial tribunal. The law to be applied by any court is not, to use a phrase of Mr. Justice Holmes, "a brooding omnipresence in the sky."

It is not to be concluded, however, that the new Permanent Court of International Justice is merely a duplication of the old Permanent Court of Arbitration. Both now exist, and there is no intention that the former should entirely supersede the latter. The panel of 148 persons composing the Permanent Court of Arbitration¹⁶ is still needed for cases in which disputant states will desire to arbitrate before judges chosen *ad hoc*. Such a desire may be entertained, because some of the judges of the new Court may be *personae non gratae* to a particular state, or more probably because the new Court is thought to be too busy or too large to handle a particular case. The Permanent Court of Arbitration is needed, also, for the nomination of the list of candidates from which the judges of the new Court may be chosen. But the Permanent Court of International Justice constitutes a signal advance over what it was possible to achieve at The Hague in 1899. It is in reality "permanent"; it is in reality a "court"; and

¹⁶ *Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage*, 23^{me} année, pp. 7-11.

with judges elected for terms of nine years it should come to have in time a continuous line of decisions and a consistent body of jurisprudence which may furnish a sound basis for the renovation of international law.

SANCTIONS FOR THE COURT'S DECISIONS

Once a decision has been given, how is it to be enforced? What "sanctions" are behind it? The Statute of the Court is silent on this point, and the Court's situation is not unlike that of the United States Supreme Court in this respect.¹⁷ But for the fifty-two members of the League of Nations, a special obligation does exist. For they have agreed in Article 13 of the Covenant to "carry out in full good faith any award that may be rendered," and not to "resort to war against a member of the League which complies therewith," leaving it to the Council to "propose what steps should be taken to give effect" to an award which is not complied with; and Article 16 prescribes certain consequences if any member resorts to war in disregard of this undertaking. These provisions are generally taken to apply to decisions of the Court, though they do not apply in any way to states not members of the League. But the principal "sanctions" for the Court's decisions, for all states, must be derived from the moral strength of the Court, and the moral force of the world's opinion behind it.

It is important, therefore, both by reason of the voluntary nature of its jurisdiction and by reason of the moral nature of its authority, that the Court shall have a united world supporting it. Successful functioning for a few years will give it great prestige, and the determination of a few important cases like that involving the nationality laws of Tunis and Morocco will dramatize its serviceability. But every possible encouragement is needed, first for resort to the Court by disputant states, and then for compliance with its decisions. On

¹⁷ On this point, see Charles Warren, *The Supreme Court and Sovereign States* (1924), pp. 77 ff.

the machinery of justice, at any rate, it would seem that the world should be able to unite.

THE RÔLE OF THE UNITED STATES

What, then, is the rôle of the United States in this achievement? Is our position with the fifty-two states that are making it a success, or with Abyssinia, Ecuador, Germany, Mexico, Russia, and Turkey that stand outside of it? Apart from Mr. Root's and Dr. Scott's contributions to the work of the Committee of Jurists and Judge Moore's acceptance of a seat on the Court itself, the United States has taken no part in establishing the new Court. Our government has yielded the position of leadership in the movement which it held under the presidencies of McKinley, Roosevelt, Taft, and Wilson. But that water is over the dam. With the organization of the Court completed, the question now is, what part shall America play in supporting and maintaining it?

At the present time, our situation is this: the United States may have access to the Court on terms of equality with any other state. We may refer to it a dispute in which we are involved, if the other party consents; or we may consent when the other party seeks to refer it. We therefore reap the benefit of having a ready tribunal for our own as well as for other nations' disputes. Yet we pay no part of the Court's expenses. The rent of its headquarters in the Peace Palace at The Hague, even the salary of Judge Moore, is paid entirely by the League of Nations. We have a voice in the preliminary stage of the election of judges; in the nomination of the persons whose names are to be on the list from which the Assembly and the Council elect, the American group in the Permanent Court of Arbitration has the same privilege as other national groups, though in 1921, Messrs. Gray, Moore, Root, and Straus, who form the American group, declined to accept the invitation to nominate. But in the final stage of the election, in the voting in the

Assembly and the Council, America has no voice, since we are not represented in either body.

How would this situation be changed, if the United States adhered to the treaty establishing the Court? The conditions under which we might invoke the Court's jurisdiction would probably remain the same; for it seems unlikely that we should adopt the optional clause agreeing that the Court might take compulsory jurisdiction, without special agreement, over any dispute which may arise with a state which also adopts the optional clause. The United States has never shown a willingness to go so far. The situation with reference to the Court's expenses would certainly be changed; for, though the treaty would not obligate us to pay any part of the Court's expenses, we should doubtless insist on a separate agreement fixing our quota and determining how it should be paid. Greater participation in the election of the judges would not follow unless it were expressly stipulated for. So that the formal act of accepting the treaty would not greatly change the present situation, except in enabling America to bear her share of the burden of maintaining the Court, and to use her influence to increase its strength and prestige.

Why, then, do we withhold our action? It is not because of any opposition to the idea, even in the days of strictest isolation. The major political parties have repeatedly voiced their acceptance of the idea. In 1916 the Republican national platform was very downright in stating: "We believe in the specific settlement of international disputes and favor the establishment of a world court for that purpose." And Senator Lodge was reëlected in 1922 on a platform in which the Republicans of Massachusetts declared: "We stand for a Permanent Court of International Justice." Nor is it because of any dissatisfaction in America with the scheme adopted; the comment has been all but unanimously favorable. And the selection of Judge Moore to sit on the Court has been greeted with approval by lawyers and laymen throughout the country.

CONDITIONS OF AMERICAN SUPPORT

American action seems to be delayed by the conditions stated by the Secretary of State on July 13, 1922. After calling attention to the fact that the United States now has no part in the voting in the election of the judges, Secretary Hughes declared that he saw "no prospect for any treaty or convention by which we should share in the maintenance of the Court until some provision is made by which, without membership in the League, this Government will be able to have an appropriate voice in the election of the judges." It is clear that acceptance of the Court Statute does not in any way involve membership in the League. The Court is a quite independent part of the League machinery, set up by a treaty wholly distinct from the League Covenant. The United States can become a signatory to this treaty without assuming any of the obligations of League membership, and without any commitment to coöperation with the League machinery as it functions under the Covenant. However, Secretary Hughes's condition that the United States must have a voice, not simply in nominating judges, as at present, but also in the final voting, must be met. Since the voting is entrusted to two League bodies, the Assembly and the Council, arrangement must be made for American participation when they act, not under provisions of the Covenant, but as electoral bodies named in the separate, distinct treaty setting up the Court.

How can this arrangement be made? It is unthinkable that the electoral functions should be taken from the Assembly and the Council, for that would mean a return to the deadlock of 1907. The sleeping dogs of state equality and Great Power hegemony must be allowed to lie. The Statute could, however, be amended to provide that states in the situation of the United States may participate in the electoral bodies. But no method of amendment is provided by the Statute itself, and no power to amend it has been con-

ferred on the Assembly or the Council. So that the thirty-five states which have ratified, if not the forty-six states which have signed the treaty to which the Court Statute is annexed,¹⁸ would have to act. In many of these states, parliamentary collaboration would be necessary. This is not only difficult and dilatory, but might also open up issues now set at rest. If possible, this course should be avoided.

If the United States should adhere to the separate treaty establishing the Court, with a reservation that the United States shall enjoy all the privileges enjoyed by any other state, and particularly the privilege of voting in the Assembly and the Council when those bodies act as the electoral bodies empowered by the Statute of the Court to make the final choice of the judges, it would seem probable that all other states would readily acquiesce, and as a result of such acquiescence the American conditions would be fully satisfied. We should not attempt to ignore the existence of such bodies as the Assembly and the Council, which has made it possible to have the Court; but we should limit our contact with them to the one function of electing the judges, in which they act wholly apart from their other activities. For good measure, it could be spelled out that the United States becomes in no way bound by, or a party to, any article of the Covenant of the League of Nations.

The conditions set by Secretary Hughes are not difficult to meet, therefore, if there be the will to meet them. And it is gratifying to have his statement, on October 30, 1922, that he thinks "suitable arrangements can be made for the participation by this Government in the election of judges of the International Court which has been set up, so that this Government may give its formal support to that Court as an independent tribunal of international justice." It is most important that such arrangements should be completed while the Court is in its infancy, and while American support may have its full influence.

¹⁸ League of Nations, *Treaty Series*, vi, 380.

International justice is not to be achieved in any generation for all time to come; for it involves a continuous process which can never be accomplished with a single stroke. But one does not need to indulge any illusions as to the importance of courts in the political life of the world to think that machinery is necessary and must be at hand. With the Permanent Court of Arbitration and the Permanent Court of International Justice both established and functioning, justice according to law has come within the nations' reach.

But machinery alone will not suffice. Behind it there must be a faith in the peaceful processes it is created to serve, and a will that it shall succeed.

IX

THE COURT AND THE OUTLAWRY OF WAR¹

THE air is fast clearing with reference to the President's proposal that the United States give its support to the Permanent Court of International Justice. The issue is drawn more plainly each day between those who want to set up machinery for the settlement of international disputes according to law and those who in disdain of all effort would continue the present anarchic state. For it is surely demonstrable by this time that the issue is really between those who believe in this International Court and those who would do nothing toward setting up machinery to prevent a recurrence of the kind of catastrophe through which the world has just passed.

The present division does not indicate anything new in American opinion. We have always had opponents to the American efforts to further organization for the world's peace. Sometimes these opponents have rested their argument on a narrowly nationalistic basis, opposing any commitment on the part of the United States. Sometimes their position has been broadly idealistic, opposing any particular plan which did not promise in itself the dawn of a millennial day. But both of these groups have been defeated in the past, and it is to be hoped that they will be defeated in the present contest.

THE UNITED STATES AND THE PERMANENT COURT OF ARBITRATION

When the United States agreed at the first Hague Conference in 1899 to the Convention for the Pacific Settlement of International Disputes which set up the Permanent Court of Arbitration, the representatives of the United States felt it

¹ Reprinted from the *New York Times* of April 29, 1923. The footnotes have been added and a few verbal changes have been made.

necessary to make a reservation which would save the faces of our more blatant nationalists. And hence the United States and Roumania and Serbia and Turkey made reservations, and on July 25, 1899, the American delegation had the following declaration entered in the proceedings of the Conference:²

Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or policy or internal administration of any foreign State; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions.

Again in 1907, when the Permanent Court of Arbitration was strengthened, the same declaration was made by the American delegation at the session of October 16, 1907.³ And when the 1907 convention for the Pacific Settlement of International Disputes was consented to by the Senate, a further reservation was maintained to this effect:

That the United States approves this convention with the understanding that recourse to the Permanent Court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute.

But these reservations so successfully met the nationalistic opposition in the United States that very little was heard of them after they were made. The record of the United States in the submission of disputes to the tribunals formed out of the Permanent Court of Arbitration has not been in any way marred by them. And during the twenty years of activity of the Permanent Court of Arbitration the United States has played a significant rôle in supporting it. President Roosevelt referred the Pious Fund case to a tribunal of the Permanent Court of Arbitration in 1902, and President Harding

² See Malloy, *Treaties and Conventions of the U. S.*, ii, 2032.

³ This declaration was later embodied in the Senate Resolution advising ratification. See *Ibid.*, p. 2247.

referred the dispute with Norway to a very similar tribunal, generally spoken of as a tribunal of the Permanent Court of Arbitration, soon after he came into office in 1921.

The eighteen cases⁴ which have been referred to the Permanent Court of Arbitration since 1902 do not by any means justify the strictures which have been passed on the work of the Hague Conferences. Indeed, looking back over these two decades of international history, it ought to be said that the Hague Conferences have been very useful so far as they went, and that the world's only regret is that they did not go further.

But Americans interested in the matter have all along perceived the inadequacy of the Permanent Court of Arbitration. It was Voltaire who said that the difficulty with the Holy Roman Empire was that it was not holy, not Roman, and not an empire. So it has been the difficulty with the Permanent Court of Arbitration that it is not permanent, not a court, and not an adequate agency for arbitration. When our delegation was sent by President Roosevelt to the second Hague Conference in 1907, it was instructed by Secretary Root to work for the establishment of a new Court to exist alongside the Permanent Court of Arbitration. Mr. Root described the new Court which he desired in the following terms: "It should be your effort to bring about in the Second Conference a development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility."⁵

But in spite of the support which the American delegation received from the British and the German delegations to the

⁴ This number includes the Norwegian-American case, decided on October 13, 1922. The list of eighteen is given in the *Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage*, 1923, pp. 39-40.

⁵ See Mr. Root's instructions to the American delegates, *U. S. Foreign Relations*, 1907, pp. 1128 ff.

second Hague Conference, they did not succeed in establishing the proposed "Permanent Court of Arbitral Justice." The Conference could only draw up a plan which did not include any method of selecting judges; and after the adjournment of the Conference, the efforts of Secretary Knox and Secretary Bacon to have various plans for selecting the judges agreed upon came to naught.⁶

When the Permanent Court of International Justice was being established in 1920 and 1921, the plans of the Hague Conference of 1907 were adopted as a basis for discussion. And the new Court fulfills almost in its details the programme which the American delegates presented to the second Hague Conference. Yet a few uninformed people now talk about the new Court as if it constituted a departure from the work of the Hague Conferences. On the contrary, it is entirely in line with what the American delegation urged the second Hague Conference to do. And the League of Nations has succeeded in achieving what the two Hague Conferences failed to achieve.

THE COURT AND THE LEAGUE

The connection between the new Court and the League of Nations has given alarm to some timid souls who, for want of an argument against the League, have habituated themselves to speak of it as "the evil thing with the holy name." They should at least begin with a precise understanding of what this connection is. And it is very difficult to see why anyone who knows the facts should think it necessary to raise any objection to the Court on this score.

First, as a matter of history, the Court was set up through the agency of the League of Nations. In the world of 1920 that was the only way the job could be done. The United States had at the time withdrawn from active participation in world politics, to give the American people a chance to fight a legalistic battle at home. The other peoples of the world — forty-eight of them at that time — were coöperating

⁶ See Scott, *An International Court of Justice* (1916), p. 4.

in the League of Nations, with a hope that it would mean the dawning of a new day in international affairs. Since the government of the United States had its hands tied from participation, they naturally availed themselves of the Council and the Assembly, and a Commission of Jurists set up by the Council, in order to frame the Statute of the Court.

But when the Statute was finished, it was not promulgated by the organs of the League. The Powers stepped outside the League organization for the moment, to draw up a separate protocol which forms no part of the Treaty of Versailles and which is in no way dependent upon the Covenant of the League of Nations. They executed this protocol as a distinct treaty, and it is the protocol which promulgates and puts into force the Statute of the new Court. Forty-six states have now signed the protocol, and thirty-five of them have ratified it.⁷ All of the forty-six are in fact members of the League of Nations, but the protocol may be signed and ratified by certain states which are not members of the League of Nations, if they are named in the Annex to the Covenant of the League. The object of inserting this provision in the protocol was to enable action to be taken by the United States in the event that the United States should not become a member of the League of Nations. Mr. Hughes has now proposed adhesion to the protocol on terms which clearly exclude any legal relation between the United States and the League.

It is due to the genius of Mr. Root that the election of the judges of the Court was left to the Council and Assembly of the League. No other bodies were in existence to which the states would have been willing to leave this important function. Some provision had to be made for the equality of all Powers and the special position of the Great Powers in connection with the election. And the Council and Assembly were the natural bodies to which to turn.⁸ But in acting as

⁷ For an up-to-date list of signatures and ratifications, see Appendix G, *post*, p. 334.

⁸ See Mr. Root's address before the Association of the Bar of the City of New York, in his book *Men and Policies* (1924), pp. 388-402.

the electoral bodies to choose the judges, these bodies do not act under any provision of the Covenant of the League of Nations or any provision of the Treaty of Versailles. They act under the provisions of the Statute of the Court, which is annexed to the independent protocol. And when Mr. Hughes's suggestion is adopted, the United States will be entitled to participation in the elections by sending representatives to these electoral bodies, while they are acting under the protocol establishing the Court.

The voting in the Assembly and the Council is restricted in the first instance to the nominations which have been made by the members of the Permanent Court of Arbitration. In 1921, when the first election of the judges of the new Court was held, the American members of the Permanent Court of Arbitration — Messrs. Gray, Moore, Root, and Straus — did not make any nominations. They will doubtless be invited to make nominations during the coming summer in connection with the election to be held in September, 1923, of a successor to Judge Barbosa, who died on March 1, 1923. But the next general election of judges will not be held until 1930. And long before that time action by the United States will doubtless have been consummated.

The work of the Court is also related to the League of Nations, in view of the duty of the Court to give "an advisory opinion upon any dispute or question referred to it by the Council or the Assembly." It is in this way that the jurisdiction of the Council and Assembly over international disputes has been brought into harmony with the jurisdiction of the Permanent Court of International Justice. In the first dispute to come before the Council of the League, the dispute between Sweden and Finland with reference to the Åland Islands, Finland claimed that the matter was wholly within her domestic jurisdiction, and Sweden claimed that it was an international matter. The Council recognized that this kind of question was legal in its nature, and stated that if the Permanent Court of International Justice had been in exist-

ence it would have asked for an advisory opinion. As the situation was, the Council had to set up a special commission of jurists to deal with the point.

The Court will doubtless be called upon to give advisory opinions with reference to the constitutional structure of the League itself. In view of the large degree to which international activities are now in the hands of the League of Nations this work of the Court may grow in proportion. In its first year, the Court was called upon to give advisory opinions with reference to three questions which had arisen in connection with the work of the International Labor Organization. And the Court has just recently been asked for an advisory opinion relating to the protection of German minorities in Poland.

It should be clear, however, that this function of the Court to give advisory opinions to the Assembly and the Council does not rob the Court of any of its independence. In giving such opinions, it acts according to law, and is no more subject to the control of the League of Nations than the Massachusetts Supreme Court is under the control of the Massachusetts Legislature because from time to time it is called upon to give opinions to that body.

To summarize the relation between the Court and the League: the Statute of the Court was drawn up by the bodies of the League, but not promulgated by them. The Court has an independent existence, therefore, and derives its authority from a treaty wholly distinct from the Covenant of the League. For purposes of convenience, its budget forms a part of the general budget of the League of Nations. And the Assembly and Council of the League are constituted by the Court Statute as the electoral bodies to choose the judges of the Court, after nominations have been made by the members of the Hague Court of Arbitration. It must be clear, therefore, that the United States can join in supporting the Court on the terms suggested by Secretary Hughes without in any way becoming a member of the League of Nations,

and indeed without having any legal relation to the League. Nor shall we become in any way committed to the enforcement and execution of the judgments of the Court in cases to which the United States is not a party. The objection that the Court is a creature of the League can have little weight, therefore, with persons genuinely interested in international coöperation.

THE COURT AND THE OUTLAWRY OF WAR

Another attack on the proposal of President Harding comes from an entirely different quarter. Some of the people who are prominent in the campaign for the outlawry of war have complained that the Permanent Court of International Justice is not a real court because it does not possess a full measure of compulsory jurisdiction. These people are genuinely interested in preventing war, and have a firm faith in the efficacy of effort to prevent war. But they contend that so long as war is recognized as "legal," or so long as international law has not been "codified," or so long as the nations hold back from agreeing that they may be haled before an international court as individuals are now haled before municipal courts, little is to be expected of the new Court which has been established. With some, this attitude has gone so far that they oppose any feasible step which does not in itself embody the perfection which they seek. Engrossed in the pursuit of an end, they refuse to take even the next step toward that end.

On February 13, 1923, Senator Borah introduced in the United States Senate a resolution which is frequently referred to as embodying the programme of the outlawry of war. This resolution calls for

a judicial substitute for war . . . in the form or nature of an international court, modeled on our Federal Supreme Court in its jurisdiction over controversies between our sovereign States, such court to possess affirmative jurisdiction to hear and decide all purely international controversies as defined by the code or arising under treaties, and to have the same power for the enforcement of its decrees as our Federal Supreme Court, namely, the

respect of all enlightened nations for judgments resting upon open and fair investigations and impartial decision and the compelling power of enlightened public opinion.⁹

Reading the full text of this resolution, it is difficult to see why Senator Borah did not specifically mention the Permanent Court of International Justice and announce his approval of the President's proposal with reference to it. For, like the Supreme Court of the United States, the new international Court also depends for the enforcement of its judgments on the "compelling power of enlightened public opinion." The protocol and Statute of the new Court do not suggest any sanctions of force or compulsion to be used in enforcing its judgments. Indeed, the only sanctions behind the Court are those contained in Article 13 of the Covenant, which provides merely that: "The members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against a member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto."¹⁰ The United States does not in any way agree to this provision of Article 13 in taking the action suggested by Secretary Hughes, and for us there would be no sanctions behind the Court except opinion. In this respect, then, the parallel between the United States Supreme Court and the Permanent Court of International Justice is a striking one.¹¹

But Senator Borah also desires that an international court possess "affirmative jurisdiction to hear and decide all purely international controversies as defined by the code or arising under treaties." In some of his utterances he has expressed disappointment that, when the Statute of the Court was being framed in 1920, the recommendation of the Commission

⁹ Senate Resolution 441, 67th Congress, 4th Session.

¹⁰ This text of the Covenant has been amended since September 26, 1924. See *ante*, pp. 121-122.

¹¹ See Charles Warren, *The Supreme Court and Sovereign States* (1924), pp. 69-99.

of Jurists for giving the Court compulsory jurisdiction was not adopted. Of course among the reasons for which the Powers took up such an attitude in 1920 the abstention of the United States undoubtedly figured. And when there was an opportunity for effective insistence on enlarging the Court's jurisdiction Senator Borah's voice was not heard. If he and his associates in the Senate of the United States had then been insisting that the United States advocate giving the new Court compulsory jurisdiction, they might have won the day. But that water is now over the dam.

The new Court does possess a large amount of compulsory jurisdiction. Fifteen states have signed¹² and ratified an optional clause giving to the Court jurisdiction over all disputes of a legal nature arising between themselves and other states accepting the same clause. It is true that these fifteen do not include any of the Great Powers. But it is a significant fact that as to fifteen states the Court now has this compulsory jurisdiction. Senator Borah may very well advocate that the United States should join this group as a sixteenth Power. But in view of the attitude of the Senate with reference to the Permanent Court of Arbitration in 1907, and with reference to numerous arbitration treaties since that date, it is easy to understand Secretary Hughes's refusal to take on this extra difficulty at this time. And the Senate is not likely to be won over on this point by the men who during the last few years have so effectually blocked American coöperation with other states.

The Court now has compulsory jurisdiction, also, conferred upon it by numerous general international treaties. For instance, the Air Navigation Convention drawn up at Paris in 1919, the various Paris treaties for the protection of racial, religious, and linguistic minorities, the Paris Convention on Liquors in Africa, the Paris Convention revising the Berlin Act, the St. Germain Arms Traffic Convention, the

¹² For an up-to-date list of signatures and ratifications, see Appendix I, *post*, p. 339.

Barcelona Conventions on Transit and Waterways, the International Labor Conventions, and the mandates recently drawn up by the Council of the League, all confer upon the Court compulsory jurisdiction for their construction and interpretation. In addition, there are numerous provisions in the Treaty of Peace which give the Court compulsory jurisdiction, and under one of such provisions the Court is now seised of a case involving the freedom of the Kiel Canal. Moreover, special treaties are already being entered into between different Powers giving the Court compulsory jurisdiction with reference to defined subject matter. For example, a recent treaty between Czechoslovakia and Austria and a recent treaty between Czechoslovakia and Poland.

But it is very easy to overemphasize the importance of compulsory jurisdiction. In this connection it is misleading to attempt an analogy between individuals before a municipal court and states before an international court. We have learned in our own national history that one of our American states cannot be treated as an individual litigant would be treated before our own national courts. This is abundantly clear on a reading of the judgments of the Supreme Court in the suit of *Virginia v. West Virginia*.¹³ In fact, however our agreement may be formulated, the world is at any time dependent upon the faith which men possess in the judicial process and the general desire for peaceful settlement of even the most exigent situations. We must not too easily pin our faith to states' agreeing to do what they may not want to do when the time for action comes. When the action suggested by Secretary Hughes has been taken, opportunity will still exist for insistence that the Court's jurisdiction be enlarged.

Senator Borah's resolution also calls for the adoption of a "code of international law of peace based upon equality and justice between nations." The notion that international law may be codified has proved a seductive one at vari-

¹³ (1911) 220 U. S. 1; (1911) 222 U. S. 17; (1913) 231 U. S. 89; (1915) 238 U. S. 202; (1916) 241 U. S. 531; (1918) 246 U. S. 565.

ous times in the past. Half a century ago, codification was being actively agitated, and in 1872 David Dudley Field published his "Draft Outlines of an International Code."¹⁴ It should be a sufficient lesson in the subject for one to pick up Field's "Outline" and study it in connection with the history of international relations during the fifty years since it was published. He will discover that the more important of Field's provisions have been realized, not through over-night formulation of dogmatic statement, but through the increasing number of international unions so admirably described by the late Dr. Reinsch.¹⁵ The Postal Union, the Telegraphic Union, the Metric Union, the Monetary Union, and a number of others have given us a substantial body of international law which now makes Field's "Outline" seem arid and artificial, if also prophetic. Similarly, in the three years since the League of Nations was established, we have had significant additions to our body of international law. We have got, since the Peace Conference met at Paris, a number of treaties for the protection of racial, religious, and linguistic minorities, one of which will be applied by the Court when it meets on June 15.

The Borah resolution would also provide that "war between nations should be outlawed as an institution . . . by making it a public crime under the law of nations." As a general aspiration, this expresses what is in the minds of all who are genuinely endeavoring to find substitutes for war. Any provision which will increase the aversion to war is certainly to be encouraged. And it is quite possible that a specific pronouncement of the illegality of war may contribute to this end. But certainly our effort cannot end with a fiat, and too much faith should not be put in a declaration which cannot execute itself. To make war a crime effectively, it would be necessary to provide some method of punishment. Senator Borah would have every nation "punish its

¹⁴ A second edition appeared in 1876, entitled *Outlines of an International Code*.

¹⁵ Reinsch, *Public International Unions, their Work and Organization* (1911). See also Woolf, *International Government* (1916), particularly pp. 153-388.

own international war-breeders or instigators and war profiteers." Such punishment might be expected in case of a nation's defeat. Bulgaria and Greece have recently given us examples. But it seems difficult to rely upon a victorious nation's punishing the men who have led it into and safely through a war. Once war has been declared, all of the patriotic emotions call for loyalty to a nation's leaders.

But there is an effective method of outlawing war, as Senator Borah himself has recently pointed out. He has said in a recent magazine, "There is but one way to outlaw war, and that is to organize the world for peace."¹⁶ Pronouncement that war is illegal may prove useful. But it would be a mistake to put too much faith in it, unless at the same time machinery is created which will make it possible to mobilize the world's opinion in favor of peace in times of crisis. The difficulty is not that the masses of men desire to fight; it is that the masses of men may not get a chance to express their desire not to fight. To make their voices articulate, to give effect to their abhorrence of war, machinery must exist for the quick assembling of conferences for the airing of difficulties and for the expression of the world's sober second sense. Such machinery does demand organization, as Senator Borah himself recognizes. It means institutions. One of these institutions, now within our reach, representing a culmination, however incomplete, of thirty years of effort, is the Permanent Court of International Justice. Senator Borah's resolution is in itself the strongest argument which has been made for adopting the President's proposal.

It would be a tragic discouragement to efforts to organize the world for peace to have the United States refuse to lend its support to increasing the prestige and influence of the Permanent Court of International Justice. It would be equally tragic to have the country take this step and content itself with going no further. For the perfection of our judicial

¹⁶ *Locomotive Engineers' Journal*, April, 1923, p. 263.

machinery is but one of the necessary steps in outlawing war. Such machinery can at best handle only disputes which involve questions of a juridical nature. Senator Borah's resolution would restrict a court to "purely international controversies as defined by the code or arising under treaties." In other words, some international disputes are of a non-legal nature, involving questions which no system of international law can adequately cover and which no body of judges can adequately handle. Such, for instance, was the dispute of Sweden and Finland over the Aaland Islands in 1920, and such has been the dispute between Poland and Lithuania over Vilna. For handling such cases it is obviously necessary that some conciliation machinery should be at hand in addition to a tribunal for adjudication. It is chiefly with reference to the non-juridical questions that nations are likely to fight. For the most part, the kind of case that comes before courts, the kind of case that has come before the Permanent Court of Arbitration, for instance, is not the kind of case which leads to war. The more serious cases are likely to be those which call for conciliation, compromise, and adjustment, as distinguished from arbitration and adjudication.

The outlawry of war, then, necessitates both kinds of organization. In our present international situation it calls for the support of the Permanent Court of International Justice and the maintenance of the Council and Assembly of the League of Nations. The latter bodies were created as a result of "the acceptance of obligations not to resort to war" in the Covenant of the League. And the Covenant itself represents a solemn attempt by fifty-two peoples to outlaw war. If some of its provisions are not satisfactory to America, that can be no reason for refusing to accept the rest of them.

It is not given to any generation to provide whole cloth for the future. But each generation can add something to its own inheritance, to be passed on to the future for succeeding generations to mold as they will. Such additions, if wisely made, involve always a willingness to take the next step. The

generation of Americans who have lived through the World War will have failed to improve its own inheritance if it does not make progress toward the outlawry of war by handing on to the future the two institutions which constitute the war's one great legacy — the Permanent Court of International Justice and the League of Nations.

X

LAW AND JUSTICE IN INTERNATIONAL RELATIONS¹

IT is very fitting that this discussion of the "clarification of the law and the administration of justice" should include a consideration of the proposal that the United States should give its support to the Permanent Court of International Justice. There is no field in which it is now more imperative that justice be administered according to law than the field of international relations. The world has too long remained without adequate judicial machinery for administering justice between nations. In our present situation it is a great opportunity which is offered to the United States to throw the full weight of its large influence behind the effort to substitute law for force in the world of modern states.

The Statute of the Permanent Court of International Justice has now been before the country for more than two years, and it is extraordinary that the reception of the Statute should have been so nearly unanimously favorable during this period. Indeed, in two years of discussion our writers and jurists did not develop any significant objections to the new Court as it was set up in 1920 and 1921. The President's proposal of February 24 has given to the discussion a more immediate slant, however, and we have now begun to get more general opinion focussed on the plan and character of the new tribunal. It may be too early for one to say that this general discussion has not developed any effective objections to the new Court. But to date it is significant that the few objections current should be so distinctly unrelated to the structure of the Court itself.

¹ An address before the Academy of Political Science in the City of New York, at its semi-annual meeting on "Law and Justice," May 10, 1923.

The objection that this Court is a private court of the members of the League of Nations was put forward by Dr. David Jayne Hill before the resolution of the Council of the League of Nations of May 17, 1922. At the time he put it forward, it is perfectly true that it was then possible for only those states members of the League of Nations, or mentioned in the Annex to the Covenant of the League of Nations, to appear before the Permanent Court of International Justice as parties plaintiff, if I may call them that. That is perfectly true. It has always been possible, for instance, for the United States and Ecuador and the Hedjaz, states named in the Annex to the Covenant of the League, to appear before the Court as parties, although not members of the League of Nations. Since the seventeenth of May, 1922, however, at which time a resolution was adopted by the Council of the League of Nations, it has been possible for any state to appear before the Permanent Court of International Justice; and in the period since that date, we have two examples of the appearance there of states not members of the League of Nations.

Last summer in the consideration of one of the questions submitted for an advisory opinion, counsel appeared before the Court on behalf of the Hungarian government — Hungary was not at that time a member of the League — and we have had the news within the last three weeks that the German government will appear before the Court when it meets on the fifteenth day of next month. I think, therefore, that this objection is no longer valid, since the Council's resolution of last May. The Permanent Court of International Justice is a real international court to-day, open to all the states of the world.

I propose now to deal with two phases of the situation about which there has existed some confusion, and about which information may perhaps be lacking in some quarters. I shall first attempt to describe the work of the Court to date, referring briefly to the four opinions which it has handed

down and to the four cases which are now pending before it. I shall then deal with the jurisdiction of the Court and the prospects for its usefulness in the immediate future.

A year ago the Court had just adjourned its first organization meeting. It had adopted the rules of court and had completed its own organization. These rules of court have since been received with satisfaction throughout the world. A number of lawyers have written about them, and opinion has unanimously greeted them as a distinct advance in our law of international procedure.

At that time it was still doubtful whether the Court would have enough to do to keep the judges busy. Some of us recalled the early history of the Supreme Court of the United States, and we recollected that, although the Supreme Court had met in Philadelphia regularly each February and August, it was not until its sixth session that any contested case came before it. It was pointed out, however, that it would be a very important thing in the international situation to have the new Court come together on the fifteenth day of each June, whether it had any business or not, and the requirement of the Statute that such meetings should be held periodically was very gratifying to all who were interested in the launching of the new tribunal.

When the Court met for its first regular session on June 15, 1922, two questions were before it for advisory opinions. Both concerned the activities of the International Labor Organization. And before the session had been concluded in August, a third related question was referred to it by the Council of the League for an advisory opinion. The most significant thing about the first three opinions of the Court was the fact that the Court functioned so easily and so satisfactorily. Not that the judges were unanimous in the first three opinions rendered. In rendering the second opinion, for instance, two judges, of French and Roumanian nationality, dissented. But their governments readily acquiesced in the opinions which the majority of the Court gave, and as

a result of the summer session of the Court it may be said very confidently that three important questions in connection with the activities of the International Labor Organization have been put at rest. It should not be supposed that there was no aroused public sentiment in connection with these questions. On the question as to the propriety of the method followed by the Netherlands government in choosing representatives to the International Labor Conference, the labor unions of northern Europe had become very much worked up. On the question as to the competence of the International Labor Organization to deal with agricultural labor and agricultural production, various interests in France had become very much excited. But all the interested groups at once accepted the solutions offered by the Court. And its usefulness in smoothing out these difficulties of international coöperation became at once apparent.

A fourth question was submitted to the Court in October, 1922. The Council of the League asked for an opinion on the question whether the dispute between Great Britain and France with reference to nationality decrees issued in Tunis and Morocco was or was not by international law a matter of solely domestic jurisdiction. The Court met in January, 1923, to consider this question, and on February 7 it handed down a unanimous opinion to the effect that the dispute was not by international law solely a matter of domestic jurisdiction. Some questions have arisen in the United States about the effect of this decision. For instance, one journalist, writing in the New York *Herald*, has expressed a fear that the effect of the opinion would be to give the Court complete control of the nationality question in the United States, if the United States should give its support to the Court. But an examination of the opinion would readily dispel such a fear. The decision deals with French decrees which relate to persons born not upon the territory of France itself, but upon the territory of French protectorates. Great Britain relied upon treaties between herself and Tunis and Morocco which

antedated the establishment of the protectorates themselves. She also relied upon special negotiations between the British and French governments conducted after the protectorates were established. In both Tunis and Morocco the question was one of interpreting international agreements which the French did not deny to be binding upon them. Moreover, Great Britain relied upon a most-favored-nation clause in one of her treaties with France. The Court was very careful to point out that in the present state of international law questions of nationality are, in principle, within the jurisdiction of each state. But it was decided that in view of the international commitments as to Tunis and Morocco the question raised by the British government had ceased to be one which by international law lies solely within the domestic jurisdiction of France. The Tunis and Morocco case therefore is a very special one, resting on the special nature of the protectorate and of the international engagements in force. Moreover, in view of the provision in Article 59 of the Court Statute that a "decision of the Court has no binding force except between the parties and in respect of that particular case," the opinion in this case could have no binding force as a precedent in cases which might arise in the future.

Immediately after the opinion of the Court was handed down, the French government requested that the dispute should then be considered by the Court on its merits, and it finds place therefore in the docket which now awaits the assembling of the Court on the 15th of June of this year.²

Three other cases are also on the docket for the session of the Court in June, 1923. The first of these is a contested case relating to the freedom of the Kiel Canal as established by Article 386 of the Treaty of Versailles. The parties are France, Great Britain, Italy, and Japan, acting as the Principal Powers named in the Treaty of Versailles, and Germany. The case arose out of a refusal by the German government to permit the steamship *Wimbledon* to pass through the Kiel

² The case was never heard on its merits. See *ante*, pp. 52-53.

Canal to carry munitions to Poland in the summer of 1920. It was at the time when Poland and Russia were at war, and Germany, being a neutral power in the war, declined to extend this privilege to a vessel under French charter. It is claimed by the Allied Powers that this refusal is a violation of that provision in the Treaty of Versailles which requires that the Kiel Canal be maintained "free and open to the vessels of commerce and of war of all nations at peace with Germany." This is an instance of the exercise by the Court of its jurisdiction over contested cases, and it happens to be a case in which the Court has been vested with a compulsory jurisdiction by a special provision of the Treaty of Versailles. Germany has recognized the jurisdiction of the Court and has exercised her privilege under Article 31 of the Court Statute to have a judge of her own nationality sitting when the case is heard. For this purpose the German government has recently appointed Professor Walter Schücking, who has long been known for his excellent work on international organization.

Another case pending before the Court relates to the protection of German minorities in Poland. The Council of the League has asked for an advisory opinion on the interpretation to be given to certain provisions in the special treaty drawn at Paris for the protection of minorities in Poland. This treaty was signed by the United States of America, the British Empire, France, Italy, Japan, and Poland, on June 28, 1919. The interpretation is necessitated by the fact that after the Armistice of November 11, 1918, the German colonization authorities had approved certain contracts made with German colonists in Polish territory which was then a part of Germany, and which was later transferred to Poland. The Polish government considered itself entitled to cancel these contracts, and to this end it has taken measures to expel the German colonists from the land which they occupied, refusing to recognize leases made by the German government after November 11, 1918. The Court is now asked

to determine whether the questions involved are covered by the minority treaty drawn at Paris to protect the German and other minorities in Poland.

The case instances the importance of having machinery always at hand for dealing with minorities cases. Before the Court was established, such machinery was lacking, and although adequate provisions had been written in the Treaty of Berlin of 1878, they had always been flouted. When in 1902 the government of the United States made a protest, there was no forum before which the United States could go. This jurisdiction of the International Court therefore may prove to be among its most important functions.

The fourth question which is now pending before the Court calls for an advisory opinion on the interpretation of certain provisions in the Peace Treaty signed at Dorpat on October 14, 1920, between Finland and Soviet Russia. By this treaty, Russia's jurisdiction was recognized over the Finnish population of Eastern Carelia, and the Soviet government agreed to give to that population a certain degree of administrative, economic and cultural autonomy within the Russian State. It was in return for this agreement that the Finnish government consented to the boundary which was drawn up at the time. Finland has complained for more than a year that the Russian government has not executed this part of the Treaty of Dorpat. The two powers are not agreed as to the extent to which the provisions of the treaty imposed an international obligation on Russia. It is at Finland's request that the Court has now been asked by the Council to say whether the Treaty of Dorpat placed Russia under an international obligation with respect to the Finnish minority.

These four cases which are pending before the Court to-day mirror quite accurately the complexity of our modern international life. They deal with subjects so varied as the nationality decrees in Tunis and Morocco, the freedom of the Kiel Canal, the protection of German minorities in Poland, and the meaning of certain provisions in the peace treaty between

Finland and Russia. Without a tribunal in the world to which these questions could be referred, there would obviously be a great deal of international bickering if not of international strife.

In the first year of its existence, then, the Permanent Court of International Justice has handed down four advisory opinions and it has been asked for advisory opinions in two more cases. It has before it to-day two contested cases, and the present docket, even if it is not added to, will undoubtedly keep the Court busy for a year to come. The record would seem to indicate that the new Court is not to be permitted to stay idle for long, and it seems probable that the judges may be occupied at The Hague during most of their working year for some years to come.

In this connection special interest attaches also to the jurisdiction of the Court, which is another phase of the situation to which I would refer. Objection has been made in some quarters that the Court does not have a sufficient amount of compulsory jurisdiction. It is to be noted that, while the Council and Assembly of the League did not retain in the Court Statute the recommendation of the Committee of Jurists that the Court be given obligatory jurisdiction in all cases of a legal nature, yet as the situation stands to-day the Court does have a great deal of compulsory jurisdiction. I use this term to describe the situations in which a special agreement between the parties is not necessary in order that a case may come before the Court. The Court is now vested with such jurisdiction derived from three sources: (1) the Optional Clause annexed to the protocol establishing the Court; (2) general international conventions; and (3) special bipartite international treaties.³

The Optional Clause annexed to the Court protocol involves an undertaking by all states which sign it to refer to the Court all legal disputes arising between them, concerning

³ For a complete list of these treaties, to the date of its publication, see *Publications of the Court*, Series D, No. 4.

(a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation. This clause has now been accepted by twenty states,⁴ and while the list does not include any of the Greater Powers, this will undoubtedly furnish an important field for the Court's activity and usefulness.

Then there are many international treaties which confer jurisdiction on the Court. The Treaty of Versailles, for instance, has a number of provisions such as those relating to the Kiel Canal, which look to the settlement of questions of interpretation and construction by such a tribunal. The Air Navigation Convention, drawn up at Paris, confers upon the Court compulsory jurisdiction for its interpretation and construction. Similar provisions are to be found in all the minority treaties drawn up at the Peace Conference, in the Barcelona Convention on freedom of transits and freedom of waterways, in all the mandates issued by the Council of the League, and in various other treaties of a general international nature. It is essential that this body of international legislation should be subject to court interpretation in this way, and with the growing extent of such legislation the new Court has become an indispensable instrument for the development of conventional international law.

In international treaties between individual states it may likewise become fashionable to have clauses inserted which would invest the Permanent Court of International Justice with jurisdiction over any disputes as to interpretation or construction of the language used in the treaty. Such a treaty has recently been made by Czechoslovakia with Austria, and it is not difficult for one to envisage the possibility that many such treaties will be made in the future.

⁴ For an up-to-date list of signatures and ratifications, see Appendix I, *post*, p. 339.

The Court has therefore a large amount of compulsory jurisdiction. Some people will continue to regret, no doubt, that its jurisdiction does not extend to all cases of a legal nature which may arise. It would be a simple matter for the United States to accept the Optional Clause attached to the Court protocol. But the history of arbitration treaties in our Senate gives little encouragement to the belief that a proposal to this effect would easily be accepted by our treaty-making power. Moreover, it would be easy to attach too much importance to this question of jurisdiction. Provisions conferring jurisdiction on the Court cannot be self-executing, and in the end they will depend upon opinion for their enforcement. As the history of the Court's work is building, as its jurisprudence cumulates with decisions, there will grow up a greater likelihood that in times of exigency public opinion will demand resort to the Court before there is a resort to force.

The immediate task is now to establish this machinery on a firm basis. It will then remain to cultivate and develop an opinion which will call for its being used in an ever-extending field. The record to date as well as the faith which has already developed encourage us to hope that a short step has been taken on the road from force to law. This faith will grow with full participation by the United States in the constructive effort which has too long gone on without our assistance.

XI

PROPOSED CHANGES IN THE COURT STATUTE¹

IN his message of December 6, 1923, President Coolidge recommended to the "favorable consideration of the Senate" the proposal of President Harding of February 24, 1923, that the United States adhere to the protocol of signature of the Permanent Court of International Justice. Further initiative by the President is not required, for treaties are unlike ordinary bills introduced in the Senate, and proposals for the exercise of the Senate's function to "advise and consent" to their ratification continue before the Senate until finally disposed of.

The proposal relates so intimately to the administration of justice and to the extension of law in society that the legal profession has a special interest in the action to be taken by the Senate. This has been recognized by the American Bar Association in the resolution adopted at Minneapolis on August 31, 1923,² so that there can be no doubt about the attitude of the organized bar toward President Harding's proposal. But so many opportunities for confusion exist, that a review of some of the arguments against the Court may serve a purpose at this time, and the acceptance or rejection of these arguments by the American people will largely depend on the attitude maintained by the legal profession.

¹ Revised text of an address before the Missouri Bar Association, at Kansas City, on December 14, 1923; reprinted with slight changes from the *Amer. Bar Assn. Jour.* for January, 1924, pp. 13-18, 49.

² "Resolved that the American Bar Association joins in what it believes to be the wise judgment of the American people, that the United States ought to become one of the supporters of the Permanent Court of International Justice at The Hague, and that our government therefore should adhere to the protocol establishing the court, in the manner set forth by the President in his message to the Senate of February 24, 1923." See *Report of the American Bar Association for 1923*, pp. 61-62.

THE COURT OR A COURT

As the question is now presented, various cleavages are possible. But it seems most probable that the enemies of the Court will follow the tactics which were followed with reference to the Covenant of the League. Few of them will dare to say that they are opposed to *a* court. They will say that they are opposed to *this* Court. And they will then proceed to offer conditions or reservations upon which the country will be asked to line up.

It should now be clear that the time has passed when people may help by being in favor of *an* international court. For the development has been such that one may as well be opposed to any international court as to be opposed to this one. No other court is in sight, and it would seem extremely unlikely that the fifty-four Powers which are now contributing to the expenses of the Permanent Court of International Justice, and the forty-seven Powers which have signed the protocol for maintaining it, would agree to abandon their undertaking altogether. It is therefore a question of how the United States can get into line with other states in supporting the existing Court, and this question involves a review of our recent history.

HISTORY OF THE COURT

The treaty establishing the Permanent Court of International Justice, called the "protocol of signature," was first signed on December 16, 1920. Twenty-five ratifications were necessary to put it into effect, and the requisite number had been deposited by September, 1921. In that month, the eleven judges and four deputy judges of the Court were elected by the Council and Assembly of the League of Nations, and in January, 1922, the Court met for its preliminary session. On November 12, 1923, the Court met for the fifth time. In the two years of its existence it has dealt with nine different questions. It has already handed down eight opinions, and has refused to give an opinion in one case.

During the period in which the Statute of the Court was being framed in 1920, the government of the United States had nothing to say on the subject. Mr. Root was a member of the Committee of Jurists that drew the Statute, but he did not act as a representative of the American government. Throughout 1921, while the protocol was being ratified, the government of the United States remained silent, although the United States was invited to sign the protocol. On July 13, 1922, Mr. Hughes, being pressed to take action in support of the Court, wrote to Mr. Hamilton Holt that he saw "no prospect for any treaty or convention by which we should share in the maintenance of the Court until some provision is made by which, without membership in the League, this Government would be able to have an appropriate voice in the election of the judges."³

In the fall of 1922, however, Mr. Hughes was more positive. In speaking in the campaign of 1922 on behalf of the reelection of Senator Lodge, in an address at Boston on October 30, he expressed his belief "that suitable arrangements can be made for the participation by this Government in the election of judges of the International Court which has been set up, so that this Government may give its formal support to this Court as an independent tribunal of international justice."⁴ This was in effect a governmental declaration made by an administration which was submitting its policies to the voters of the country, and it was not repudiated by Senator Lodge at the time.

It was not until February 24, 1923, more than two years after the protocol of signature of the Court was drawn up, that President Harding moved in the matter. In proposing the adhesion of the United States to the protocol, he gave his approval to certain conditions that had been formulated by Secretary Hughes, providing for:

(1) The exclusion of any legal relation to the League of Nations.

³ *New York Times*, July 15, 1922, p. 1.

⁴ *Ibid.*, October 31, 1922, p. 4.

(2) Participation by the United States in the election of judges by the Council and the Assembly.

(3) Payment of a fair share of the expenses of the Court by the United States, as voted by Congress.

(4) Consent of the United States to any amendment to the Statute of the Court.

These conditions were debated very widely throughout the country during the following March and April and May. In June, the opposition to the Court had sufficiently impressed itself on President Harding for him to seek to compromise with it.

PRESIDENT HARDING'S ST. LOUIS SPEECH

In his address at St. Louis on June 21, 1923,⁵ President Harding enumerated two conditions which he considered indispensable to participation by the United States. First, that the tribunal should be "in theory and in practice, in form and in substance, beyond the shadow of a doubt, a world court and not a League court." Second, "that the United States shall occupy a plane of perfect equality with every other Power." These conditions on their face will doubtless appeal to most Americans.

But it is difficult to see how anyone can doubt that the Permanent Court of International Justice is "in form and in substance" a *world* court. Fifty-four states are contributing to the expense of maintaining it. Forty-seven states have signed the protocol, thirty-six states have ratified the protocol, and the clause conferring on the Court compulsory jurisdiction has now been accepted by twenty-one states. But aside from these formal facts, the Court is open on equal terms to all states of the world, regardless of their position with reference to the League of Nations, and regardless of their not having acted with reference to the protocol of signature. Hungary appeared before the Court prior to her admission to the League of Nations. Germany has also ap-

⁵ Relevant portions of the address are reprinted in *Amer. Jour. Int. Law*, vii, 533-536.

peared, though not a member of the League, and last summer a German judge sat on the Court under that provision which allows every litigant state to have a judge of its own nationality sitting to hear its case. It would seem to be clear beyond even the "shadow of a doubt," that a court maintained under these conditions is preëminently a *world court*.

RELATION OF THE COURT TO THE LEAGUE

The connection between the Court and the League ought to make it as clearly impossible to call the Court a "League Court," if that term implies a lack of capacity to serve all the nations of the world as an independent judicial tribunal. There are four respects in which there is a connection between the Court and the League: first, in the creation of the Court; second, in its financial administration; third, in the election of the judges; and fourth, in the giving of advisory opinions.

(1) It is sometimes said that the Court is a "creature of the League." There is a sense in which this is true. The Statute of the Court was drawn up by a Commission of Jurists appointed by the Council of the League and was later approved by both the Council and the Assembly. But the Court was not brought into existence by an *act* of the Council or Assembly. It was brought into existence by a treaty which is a separate, distinct and independent document, forming no part of the Covenant of the League and no part of the Treaty of Versailles. So that as it exists to-day, the Court derives its being from no act of the Council or Assembly or any other organization of the League.

(2) As to the finances of the Court, the fifty-four members of the League now pay all of the expenses. The budget of the Court forms a separate part of the budget of the League of Nations. Regulations provide that the administration of the Court's finances shall be independent of the financial administration of the Secretariat of the League. When a dollar is received by the Financial Director of the League of Nations, a certain percentage of it must be set aside immediately to

be used only for the expenses of the Court. In 1924 the entire expenses of the League of Nations will be about four and one half million dollars. Approximately one twelfth of this sum has been appropriated for the expenses of the Court. So that out of every one hundred dollars received by the League from any of its fifty-four members, about eight dollars must be set aside for the Court and can be used for no other purpose.

(3) The judges are elected by the Council and Assembly of the League. But in performing this function, these bodies do not act under any provision of the Covenant. They act as *electoral* bodies named in the Statute of the Court. Once the judges are elected, neither the Council nor Assembly can remove them, nor control them in any way. So that in the discharge of their duties the judges are as independent of the Council and Assembly which elect them as the judges of the United States Supreme Court are independent of the President who appoints them with the confirmation of the Senate.

(4) The Court may be asked to give advisory opinions by the Council or Assembly of the League. This jurisdiction of the Court is based on an American ideal. In several of our states, notably in Massachusetts, which was the first state to adopt the practice, the state legislature may ask the judges of the supreme court for an advisory opinion. It has never been suggested that on this account the Supreme Judicial Court of Massachusetts is subordinated to the influence of the Massachusetts legislature. Yet it is now being suggested that the International Court is somehow, because of this function, subordinated to the Council and Assembly of the League. In view of the refusal of the International Court, on July 23, 1923, to give an opinion to the Council of the League on the Eastern Carelia question, as it had been requested to do, such insistence is obviously without foundation.

INDEPENDENCE OF THE COURT

The four special connections between the Court and the League leave the Court thoroughly competent to perform its duties as an independent, judicial tribunal. They leave the judges wholly free of political influence. And they offer no barrier whatever to the Court's serving all the nations of the world in an impartial fashion. Admitting that the United States is not now to become a member of the League of Nations, the United States can join in the support of the Permanent Court of International Justice without in any way involving itself in any responsibility for the activities of the Council or Assembly of the League.

It should seem abundantly plain, therefore, that the Court meets the first of President Harding's conditions. Indeed, this seems to have been Mr. Harding's opinion at the time of his St. Louis speech. But it was for the sake of "harmonizing opposing elements," and for the sake of "giving consideration to our differences at home," that Mr. Harding went ahead at St. Louis to outline a "readjustment of the existing arrangement with reference to the Court." He was careful to state that he was "not wedded irrevocably to any particular method" of readjustment, but submitted his outline, "such as it is, without excess of detail, as a basis for consideration, discussion and judgment." It is not at all inconsistent with the deference due to Mr. Harding's opinions that the "outline" in his St. Louis speech should now be submitted to that consideration, discussion and judgment which he himself invited. Certain opponents of President Harding's February proposal are using the St. Louis speech as a basis for their contentions. It is therefore necessary that his suggestions be clearly understood and that they be submitted to close examination.

President Harding's suggested "readjustment" would effect three changes with reference to the Court. These relate to: (1) the election of the judges; (2) the financial manage-

ment of the Court; and (3) the privilege of requesting advisory opinions.

SHOULD THE COURT BE MADE SELF-PERPETUATING?

As to the first of these changes, President Harding put forward the idea that the Court might be made self-perpetuating by empowering the members of the Court themselves to fill any vacancy that may arise, either with or without nomination by members of the Permanent Court of Arbitration. This suggestion would have the effect of taking from the Council and Assembly of the League their functions with reference to the election of the judges. And it would give the judges themselves the power to elect their successors.

The idea of a self-perpetuating court is something quite new in judicial history. So far as the writer's researches go, there has been no instance in modern history of a self-perpetuating court. Complaint was made at the time of the French Revolution that the French courts had become self-perpetuating, but this was not literally true. It is difficult to conceive of anything more un-American than to confer on a small group of eleven men a power which no people have as yet been willing to confer in the administration of justice. It would smack of a degree of super-government, which has never been possessed by or proposed for either the Council or Assembly of the League of Nations.

Suppose a proposal were made, for instance, that the Supreme Court of the United States should be made self-perpetuating. Even those who are now alarmed by the Borah and La Follette proposals as to the Supreme Court would have no hospitality for such an idea. It is even more difficult to think of a self-perpetuating international court. We may assume that the judges of an international court would act in a high-minded way in choosing their successors. But they would be less well-equipped even than judges of a national court for such a task. For the justices of the Supreme Court of the United States in exercising such a power would have

the advantage of a large acquaintance with the lawyers from whom the judges must be recruited. But the number of lawyers arguing before the International Court is very limited, and even if a judge were well acquainted with the lawyers of his own country, he would not be likely to know so well the lawyers of other countries.

It is difficult to believe that the American people would ever consent to participation in a self-perpetuating court. But even if the American people should find such a suggestion acceptable, other peoples of the world whose nationals are not to-day among the judges would undoubtedly object to it. Can anyone imagine this proposal being put forward by the United States if there were no American among the judges of the International Court? In July, 1922, Mr. Hughes stipulated that the United States should participate in the selection of the judges. In February, 1923, both President Harding and Mr. Hughes laid it down as essential that the United States should have a voice in electing the judges. But the effect of making the Court self-perpetuating would be to deprive forty-three other states of the voice which they now have in electing the judges. For the United States would be asking that the states whose nationals are not now sitting on the Court should give up a voice which they already have, and should allow the judges of the future to be selected without their participation in any way. We should be asking Haiti, Peru, and Siam, for example, to accept a change which would deprive them of any participation in the selection of the immediate successors of the present judges. In view of the fact that for thirty years the effort to establish an international court was thwarted by the contest between small Powers and Great Powers, it would be difficult to think of a suggestion more unacceptable to the small Powers. To make the Court self-perpetuating would be to destroy the confidence in the Court now entertained throughout the world.

What advantages might be expected from the adoption of such a proposal? Surely no one would contend that the

Court would be better able to discharge its functions if it were made self-perpetuating. No one would contend that it would have a larger place in popular loyalty. The only advantage achieved would be the spiritual satisfaction which might come to certain American opponents of the League of Nations.

Moreover, this suggestion would disturb a delicate compromise which was reached by the Committee of Jurists in 1920, on the initiative of Mr. Root. Last February, Mr. Hughes stated in his letter to the President that it would be "impracticable to disturb the essential features of the system" of electing the judges. It would be as impracticable to-day as then.

FINANCIAL ADMINISTRATION OF THE COURT

The second item of President Harding's outline for "readjustment" related to the financial management of the Court. He proposed that the fixing of the compensation of the judges, the control of expenditures, the apportionment of contributions, and other similar matters, be taken away from the Council and Assembly of the League, and be transferred either to the Permanent Court of Arbitration or to a commission designated by the member nations. He pointed out that it would be an incidental effect of this proposal to "avert the admitted unfairness of the present system, which imposes a tax upon the members of the League who are not subscribers to the Court." Seven members of the League have not signed the Court protocol, and yet they do contribute to the expense of maintaining the Court. But none of these states has ever made any complaint about this, and if any "unfairness" exists, they do not aver it. It seems more probable that these states consider that the advantage of having the Court in existence, at all times open to them as litigants, and the advantage of voting in the Assembly in the election of the judges entirely compensates them for the payments which they make. So that the incidental effect noted by

President Harding presents no reason whatever for his proposal.

The suggestion that the financial management of the new Court might be transferred to the old Court of Arbitration, established in 1899, seems to be based on a misconception as to what that Court of Arbitration really is. It is not in any sense an organized body. It is merely a panel. The members of the Court of Arbitration never meet. So that if any such function were given to them, it would have the effect of changing the character of the Court of Arbitration as it now exists.

The financial affairs of the Court of Arbitration itself are handled by an administrative council composed of the diplomatic representatives at The Hague. It would be possible to confer on this administrative council the financial management of the new Court. But what would be the advantages of such a change? It would simply duplicate machinery which already exists for collecting money from the various governments of the world. It would duplicate the work which is now being done satisfactorily at Geneva, to supervise expenditures and to apportion fairly the contributions of the various states.

In the League of Nations, for instance, it has proved a difficult matter to arrive at a satisfactory *barême* for allocating the expenses. It is no less difficult to keep the quotas paid up to date. Why should these international necessities be made more burdensome? For fifty-four peoples of the world, the proposal to transfer the financial management either to the old Court of Arbitration or to the administrative council of diplomatic representatives at The Hague would have no more merit than a suggestion would have for Americans that there be a separate budget, a separate money-collecting agency, and a separate financial administration for the Supreme Court of the United States.

The present arrangement, under which the expenses of the International Court are met out of monies collected by the

League of Nations and turned over to the Registrar of the Court, does not in any sense make the Court dependent on political organs of the League. One might as well argue that the Supreme Court of the United States is dependent on the legislative and executive branches of our government, because the salaries of the judges have to be voted by Congress and the money collected by the Secretary of the Treasury.

President Harding's suggestion would have only the advantage of giving the United States a larger share in controlling the Court's finances. But Secretary Hughes's conditions of February would seem adequately to have safeguarded America's position in this respect. His third condition was that the United States would bear "a fair share of the expenses of the Court as determined and appropriated from time to time by Congress." In thus keeping it within the power of Congress to determine how much America should pay, it is obvious that Mr. Hughes has provided for an American voice in the control of the Court's finances. If a larger voice should be desired, this condition as framed by Mr. Hughes might be enlarged.

It is to be noted that American contributions to the expenses of the Court would not have to be sent through the Financial Director of the League of Nations at Geneva, but could be sent directly to the Registrar of the Court at The Hague. A precedent exists for this in the method by which Germany contributes to the expenses of the International Labor Organization; for her contribution is sent to the Director of the International Labor Office without passing through the hands of the Financial Director of the League of Nations.

SHOULD ADVISORY OPINIONS BE ABOLISHED?

President Harding's third suggestion was that "the exclusive privilege now held by the League to seek advisory legal guidance from the Court might either be abolished, or, more wisely perhaps, be extended to any member or group of

member nations." A consideration of this suggestion may be based on the actual history of the work of the Court to date. It has dealt with nine questions. Eight of these have come before it as requests for advisory opinions from the Council of the League. Of the eight requests, three related to the constitutional structure of the International Labor Organization; one related to a dispute between Great Britain and France; one to a dispute between Finland and Russia; one to a boundary dispute between Czechoslovakia and Poland; and two to the application of the Polish minorities treaty. Thus in a brief period of two years, the work of the Court has already shown how useful it is to have advisory opinions from the Court, both in connection with the functioning of the League of Nations and in connection with the political handling of international disputes. To abolish such jurisdiction of the Court would be all but a calamity. Fifty-four peoples of the world, who represent two thirds of the world's population, would find it difficult to understand why their attempt to organize the peace of the world should not be aided by a growing body of international law, as expounded in the advisory opinions of the Court. In the task of international organization, it is inevitable that many questions of a constitutional nature will arise. These questions can be handled smoothly and expeditiously only if the Court may be called upon from time to time to straighten out legal tangles.

Moreover, the fifty-four peoples who are attempting to develop international law along such lines as the mandates and the protection of racial and religious minorities will doubtless insist on maintaining in some form the Court's jurisdiction to give advisory opinions. Even in connection with the handling of political disputes by the Council and Assembly, it is most valuable to have the assistance of the Court on incidental legal questions which are bound to arise.

The objection to this jurisdiction of the Court, which led to President Harding's suggestion, is based on a notion that

the Court is somehow the "private attorney" of the League of Nations. If such a suggestion had any merit in it before the Court's refusal to give an opinion in the Eastern Carelia case, it is now wholly without foundation. For the Court has demonstrated, beyond peradventure, that it is going to perform this function in a strictly judicial manner, and that wherever an advisory opinion cannot be given according to the limitations of judicial action, it will refuse to act altogether.

If advisory opinions are not to be abolished, President Harding suggested that the privilege of requesting them be extended so that any nation might ask for an advisory opinion. But so long as the Court does not have complete obligatory jurisdiction, it is obviously impossible to provide that in case of a dispute between two nations, either of them may ask for an advisory opinion from the Court. This was in effect what was attempted by Finland in connection with the Eastern Carelia dispute, although Finland did go through the Council of the League, and her request was put forward as a request from the Council.

EQUALITY OF VOTING POWER

President Harding also suggested as a condition of American participation that the United States should "occupy a plane of perfect equality with every other Power." He proposed no specific measures to this end in his "outline." But he alluded to the removal of "the disparity in voting as between a unit nation and an aggregated empire which now maintains in the Assembly of the League." Denying that he himself had any apprehensions about the existing situation, he would seem to have insisted vaguely that steps be taken which would give the United States the same voting strength in the Assembly, in connection with the election of judges, as is enjoyed by all of the seven British peoples who are members of the League.

A proposal in this direction by the United States would

have the effect of our saying to Canada or to the Irish Free State something as follows:

It is true that you have achieved a very independent position as a member of the British Commonwealth. After a generation of effort you have placed yourself in a position where you can exercise control over your own foreign policy and enjoy a real international status. But the United States does not propose to deal with you on this basis. The United States insists that all the British nations are one single unit. We insist that they must act together, vote together, and keep the historical character of a united empire.

Such a position would not in the least correspond with the facts as to the relations among the various British peoples during the past decade. The conception of an "aggregated empire" is wholly obsolete, and the different British peoples regard themselves as in effect independent, and they frequently act independently. What has the United States to fear from recognizing this fact? In the Council of the League, we should have one vote as the British Empire has one vote. In the Assembly it is quite probable that the United States would support candidates for judgeships who would be supported by the various British peoples, for we and they have a common system of law, and together we should be in a minority with reference to the countries which have a different system of law.

The United States would seem to have everything to gain by the separate participation of the British Dominions in international affairs. The fact that the Dominions do have an international status greatly assisted in solving the Irish problem and in putting the Irish Free State on the road to prosperity. There is every reason why the United States should encourage independent action by Canada, for instance, and the Senate's reservation to the Halibut Treaty will doubtless soon be withdrawn.⁶ But whether we like it or

⁶ The Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean was proclaimed on October 22, 1924, without the reservation originally adopted by the United States Senate on March 4, 1923. See *U. S. Treaty Series*, No. 701. The original reservation of the Senate is reproduced in *Conventions and Treaties of the U. S.*, iii, 2662.

not, it is a fact that the British Dominions have achieved a large degree of independence. We cannot ignore this fact by attempting to deprive the Dominions of the votes that they already have. Nor does it seem practicable for the United States to ask extra votes in the Assembly which have not been given to other unit nations.

EFFECT OF PRESIDENT HARDING'S SUGGESTIONS

All of the "readjustments" suggested by President Harding would seem to be unnecessary from any international point of view, impracticable to achieve, and undesirable on their own merits. They would in no way improve the present situation so as to increase the usefulness of the Court, and they would have no other advantage than to meet the objections of a few Americans whose attitude is based on opposition to the League of Nations. It is difficult to see how the situation has been improved by President Harding's address at St. Louis, therefore, and the proposals originally contained in his message of February 24, 1923, still present the only practicable method of procedure.

It is interesting, however, to note the effect which President Harding's address at St. Louis has had on the opposition to the Court. It must have been perceived that the outline included changes which it would be impossible to effect, either in the United States alone, or, after acceptance by the United States, in other countries. For President Harding's address was greeted with utter coldness in European countries, and no disposition appeared on the part of other governments to meet any of his proposals half way. But certain opponents of the Court in America immediately seized upon his proposals as a method of disposing of the whole question.

For instance, Senator Borah was repeatedly quoted as saying that he would vote for giving American support to the Court on the conditions laid down by President Harding at St. Louis. But in the *Ladies' Home Journal* for October, 1923, Senator Borah stated that "self-perpetuating bodies

are contrary to democratic thoughts and ideals," and therefore he concluded that "the suggestion that the Court should fill its own vacancies . . . would not prove acceptable or wise" and "would not be satisfactory."

Of course Senator Borah has always felt it necessary to speak in favor of a court. To this extent he must follow the clear current of American opinion for a generation. While the Permanent Court of International Justice was being set up, he had very little to say on the question. Now that the Court is in being and functioning, he would apparently sweep it away with one brush of the hand and proceed to erect a new court, apparently with little consideration for what people in other countries may think.

SENATOR BORAH'S PROPOSALS

To erect his new court, what does he propose? He proposes first, "the creation of a permanent, competent body of international law." Before this "first step" could be accomplished, Senator Borah would long since have passed away. If we must wait until we have a competent body of international law, we might have to wait for generations. We did not follow such a course in setting up the Supreme Court of the United States.

Senator Borah makes only one other proposal about the new court. He says that "provision must be made in the articles creating it for the permanent presence of an American judge upon its bench." In other words, Senator Borah would go back some two decades in the progress of this movement. If an American judge must always be on the bench, then an English judge must always be there, also a French, an Italian, a Japanese, a German, and a Russian. And any other country might take the same stand.

Senator Borah also objects to the present Court because it is "merely an arbitration tribunal." He seems to have given himself entirely to a tendency which is now so current, of sharply distinguishing between arbitration and adjudication.

But if he would go through the records of arbitral tribunals for the last fifty years, it is possible that his judgment in this respect would be revised. For arbitral tribunals, like judicial tribunals, proceed on what they consider to be the law. The latest example of this is the very excellent opinion of Judge Parker, as umpire, with reference to the *Lusitania* cases before the Mixed Claims Commission between the United States and Germany.⁷

Senator Borah would like a court to be given "compulsory jurisdiction." He fails to mention in his speeches and his articles the large amount of compulsory jurisdiction which the Permanent Court of International Justice already has. The optional clause giving the Court compulsory jurisdiction has now been accepted by twenty-one states. And if Senator Borah would build on the existing institution, his desire for compulsory jurisdiction could easily be accomplished by inducing the United States to follow the example of Brazil and to accept the optional clause giving the Court compulsory jurisdiction for five years, on condition that the clause is also accepted by the Powers permanently represented on the Council of the League of Nations.

SENATOR PEPPER'S PROPOSAL

A different attitude toward President Harding's February proposal is now being taken by a group of Senators who have favored the Court and who would like to find a way of meeting the view of Senators who are irreconcilably opposed to the League of Nations. Senator Pepper is probably the most effective member of this group. In addressing the Pennsylvania League of Women Voters on November 14, Senator Pepper is reported by the Philadelphia *Ledger* to have said:

Everything would be much simpler if the nations that have set up the Court would amend the protocol under which it exists, so that there would be an electoral council and electoral assembly, and would make eligible for voting in the assembly every nation which is eligible for membership in the League, whether it is a member of the League or not. Then it would have real popular voting.

⁷ Reproduced in *Amer. Jour. Int. Law*, xviii, 361.

It seems to be along some such line that an attempt will be made in the present Congress to work out a compromise. On December 10, Senator Lenroot introduced such a resolution.⁸ The proposal of Senator Pepper may, therefore, be examined in detail.

In speaking of "eligible" nations, Senator Pepper must have referred to states named in the Annex to the Covenant of the League which have not yet become members of the League. These are the United States, Ecuador, and the Hedjaz. It is difficult to see how the addition of Ecuador and the Hedjaz, both small and not prominent states, would add to the popular character of the voting. Presumably, the electoral council and the electoral assembly would be organized as the Council and Assembly of the League are now organized, containing representatives of the same Powers.

But to make this change in the name of the electoral bodies, it would be necessary to amend the Statute of the Court. As the Statute does not make any provision for its own amendment, and as no organ of the League of Nations has any power to amend it, any change in its provisions must be effected by the ordinary procedure for making a new treaty. This means that all the forty-seven states which have signed the Court protocol would have to enter into a new treaty to change the name of the electoral bodies choosing the judges. Unanimous action by the forty-seven states would be required, and for most governments such action would necessitate parliamentary participation. It is a cumbersome procedure at best, and it would involve great delay, even if it should succeed.

But the question arises, why should forty-seven states be put to the necessity of putting into operation their treaty-making machinery, why should most of them have to go before their parliaments, simply in order that the United States may remove a purely technical objection to putting into operation its treaty-making machinery?

⁸ Senate Resolution 29, 68th Congress, 1st session.

Moreover, it would seem necessary to have an international conference to formulate an amendment such as Senator Pepper would propose. While the amendment might be formulated through the organs of the League, it would hardly be for the United States to propose that this procedure be adopted.

Senator Pepper's proposal would involve much delay, therefore. It might involve embarrassment to many Powers, and it might involve a danger of upsetting a delicate international adjustment. What advantages would it have? It would not make the Court more efficient. It would not enable the Court to do its work any better. It would not satisfy any insistence in other countries of the world, unless it would encourage the Soviet government of Russia in its effort to secede from international society.

The three leading suggestions which would modify President Harding's proposals of last February — President Harding's speech at St. Louis, Senator Borah's proposals, and Senator Pepper's attempt at compromise — leave the situation unadvanced. No valid objection to American action as proposed by Secretary Hughes has been developed in all of the discussion during these ten months. So that Mr. Hughes's proposals remain as acceptable to-day as on February 17, 1923, when he wrote his letter to President Harding.

SERVICE RENDERED BY THE COURT

Meanwhile, the Court has gone ahead with its work. It has already vindicated the practically universal acclaim with which its establishment was hailed by the lawyers of the world, including the lawyers of the United States.

Gradually but surely, therefore, a change is going on which is extending the field of law in international relations. A world court is no longer a dream, it is a dream come true. The United States is not asked to assist in establishing a court. It is merely asked to join in maintaining an established Court.

Whether the United States takes any action in support of the Permanent Court of International Justice or not, it should be clear that that Court is going on, that it will continue its work, and that Judge John Bassett Moore and his colleagues will continue to render valuable service to the world. The United States may go before the Court, whether it joins in support of it or not. The situation will not be greatly changed one way or another. What is important is that the United States should not lose an opportunity to vindicate the hope of the men who fought the war for a governed world.

XII

PROGRESS IN ADMINISTERING INTERNATIONAL JUSTICE ¹

EVER since I went through that intellectual upheaval which all of us experienced in the war, I have found myself attempting to enquire into the processes by which the world achieves what we are accustomed to call "progress."

There are many of my friends who seem to think that "progress" somehow unfolds itself with the mere passing of the suns. I am unable to take that view, for, as I make my superficial study of modern history, it seems to me that the movements to which we apply the description of "progress" are always the result of pretty determined effort on the part of somebody, and usually of effort quite consciously directed. And if I may attempt a tentative conclusion from my observations of history, it seems to me that the most usual method by which we speak of ourselves as achieving "progress" is the creation and handing on of certain institutions which the generations that follow us may shape and adapt as they will.

I start out, I fear, with a pretty determined premise: that the world is not to be saved or lost by a single generation. But I find that there are periods in history when the efforts of a single generation have quite clearly resulted in the creation and development of institutions which have served usefully the generations that followed.

VALUE OF INSTITUTIONS

As I look back on American history, it seems to me that the generation which lived in this country at the end of the century before the last was a very fortunate generation. Most

¹ An Address before the Chicago Council on Foreign Relations, December 29, 1923.

of the time men must be limited in their efforts to that slow educative process which tends gradually to increase the understanding of the need for coöperation in human intercourse. But now and then a generation seems to be especially favored with an opportunity to lay new landmarks on the road toward human understanding, and it seems to me that the generation of Americans who builded the Congress of the United States and the Supreme Court of the United States was an exceedingly fortunate generation because it had and availed itself of that opportunity.

Those institutions both existed in the world into which you and I were born, and I dare say you would agree with me that we reap the advantage of them to-day without having expended any effort in their behalf. I spend a certain amount of my time in criticizing both the Congress of the United States and the Supreme Court of the United States; but among the most radical critics of those institutions I do not know of any considerable group who would seek to abolish either of them. For both of them have somehow served the cause of "progress," as we know it, and both of them to-day are welded into that fabric of institutions that goes to make up what we call "American civilization."

It seems to me that we, the members of the generation that made the sacrifices that were necessary in the war, have an opportunity very similar to that of the generation which established the Congress and the Supreme Court of the United States. It is largely as a consequence of our having lived in such troubled times that we find ourselves so favored. The post-war world has given an exceptional opportunity to our generation to build two institutions which may be handed on to the future, for the future to use as it will. I do not want to foreclose the future. I do not particularly care what you write in any formal legal instrument that may be called a covenant or a constitution. I am particularly concerned, however, that the generations that follow ours shall have within their grasp, when they reach up their hands as we

reached up ours in 1914, institutions which may be helpful in saving the world from another such catastrophe as we have passed through.

THE LEAGUE OF NATIONS

It seems to me that the League of Nations is primarily the political institution that the world needs. I had the pleasure, a year ago, of explaining to the Chicago Council on Foreign Relations my views of the League of Nations, and in taking part here in a very interesting discussion on the subject. Since that time — may I just call it to your attention in passing?— two political events of capital importance have happened, which have greatly added to the record of the League of Nations, as we reviewed it a year ago. I refer to that outstanding political achievement of the post-war period — the financial reconstruction of Austria. To me it is a great satisfaction that we may read in the papers of Christmas week a notice that the same kind of relief is now to be accorded to Hungary. And if I may express a personal view, in passing, I would venture to say that it is only through some such method that relief is eventually going to be worked out for the starving people of Germany.

The other political achievement of the League of Nations was the opportunity that came to it, in connection with the Corfu crisis, to render a very distinct service to the cause of peace. I shall not go into the details of that crisis. But as I was present in Geneva during most of that period, I may be permitted perhaps to express the opinion that it was the intervention of the League of Nations which assured us that the world had made a considerable progress from Sarajevo to Corfu.

But there is another institution which seems to me to have great serviceability for the generations that are to follow ours, and that is the Permanent Court of International Justice. I should like to say at the outset that I have no disposition to exaggerate the importance of this institution. I am

not looking in political affairs for any water-tight guarantee that men will never fight. I am not looking for any certain assurance that the generations which follow ours must deal with problems in any particular way. What I am anxious to do is to make sure that we who have had the opportunities following the war have taken advantage of them for the sake of handing on to the men who will follow us every instrument possible that will enable them to serve the cause of peace.

THE COURT AN AGENCY OF PEACE

I do not present to you the Permanent Court of International Justice as an absolute guarantor of the peace. I do not present it to you as an instrumentality which will make war impossible. I present it to you as merely one of the instruments, one of the agencies which men may try before they resort to war. And if we may review the early history of the International Court for a few moments, I think it will be amply clear that we do have promise that this institution may serve to that end.

I had the pleasure of speaking here on the twenty-fourth day of last February. At that time I spoke of the first three advisory opinions that had been handed down by the Permanent Court of International Justice. All three were handed down in the year 1922. You may recall, some of you, that I expressed the fear that the Court was not going to have very much to do during 1923. I think I recalled the early history of the Supreme Court of the United States, which did not have a contested case until its sixth session.

My fears have proved entirely groundless. For it has been necessary for the Permanent Court of International Justice to hold three sessions during the year 1923. It has handed down six opinions during this year. I should like to go through them all, to see if we can reach here a common judgment as to whether or not this institution holds a promise of serviceability for the future.

CASES BEFORE THE COURT

The first of the cases this year was a question about the nationality of certain British subjects in Tunis and Morocco. It was in reality a dispute between Great Britain and France, although it came before the Court on a request for an advisory opinion. The French government had conferred French citizenship upon certain British subjects in Tunis and Morocco, and had begun to draft them into military service. A year and a half of diplomatic negotiation produced no result, with the consequence that the parties went to the Council of the League of Nations and then to the Permanent Court of International Justice. I am very happy to say that the advisory opinion which the Court handed down last February resulted in a settlement which the two parties announced to the Court when it met again in June.

The next matter to come before the Court was a dispute with reference to the use of the Kiel Canal. There is a provision in the Treaty of Versailles that the Kiel Canal shall remain open and free in time of peace and war to vessels of all nations at peace with Germany. The German government in March, 1921, denied access to the Canal to a British vessel sailing under a French charter from Salonica to Danzig, loaded with munitions bound for Poland to be used in her war with Russia. After a year and a half of diplomatic negotiation there was no settlement of the question and the parties, with the full approval of the German government, went before the Permanent Court of International Justice.

When the case came there to be heard, the German government was informed that Germany would be entitled to have a judge sitting on the Court for the hearing; for you will recall that there is a provision in the Statute of the Court under which any party to a case before the Court is entitled to have a judge there. The German government appointed Professor Walter Schücking, a noted jurist of Berlin, to be the judge on that occasion. Although the German, Italian, and Swiss

judges finally dissented when the judgment was handed down at the end of the summer, the German government accepted that judgment with very good grace. The Court decided — this was a contested case — the Court decided that the German government had improperly refused access to the Kiel Canal to this vessel.

The next question to come before the Court was a question really involving a dispute between Finland and Soviet Russia. When Finland and Russia ended their war in late 1920 they made a peace treaty at Dorpat, and at the time of signing the treaty the Russians made a declaration that they would establish a large measure of autonomy for the Finnish population of Eastern Carelia. It was alleged that the Russian government did not live up to that declaration, with the result that there was an insurrection in Eastern Carelia in 1921. The Finnish government, unable to reach any result in its negotiations with the Russian government, went to the Council of the League of Nations. The Council asked the Court to give an opinion as to whether or not Russia had entered into a binding international obligation with reference to the autonomy of the Eastern Carelians.

You will recall, and it is a fact very important to emphasize nowadays, that the Court refused last August to give that opinion. It refused because, it said, in effect: "We could not give an opinion on the nature of this question without at the same time foreclosing an opinion on the merits of the question. And inasmuch as the Russian government has refused to be represented before the Court in any way, taking the position that they do not recognize it, we refuse to give any opinion whatever dealing with the case."

I think if anyone has had doubts theretofore, he must be certain, since that refusal, that the Permanent Court of International Justice acts as an independent judicial tribunal, with all of the limitations surrounding judicial action, even in giving advisory opinions.

The next case to come before the Court was a request for

an advisory opinion relating to the position of Prussian colonists in western Poland. You will recall that as one of the measures for the Prussianization of Poland, the Germans sent over certain colonists in the nineties. These people had not quite completed the title to their lands when the war was over, and the Polish government began ouster proceedings against some of them.

The question arose whether that was in accordance with the provisions of the peace treaty, and the Court finally decided, after a careful argument on the question, - in which Poland was represented by Sir Ernest Pollock, the former Attorney-General of Great Britain, and Germany by Mr. Schiffer, - the Court decided that the Polish government had improperly attempted to oust those German settlers.

The next question also related to the Polish minorities treaty, but I won't trouble to go through it because it was a complicated question of treaty interpretation as to Polish nationality.

The question that the Court has just now given an opinion on, is a boundary question between Poland and Czechoslovakia. The question was whether in a particular district called the Jaworzina district the negotiations between the Poles and the Czechs should be taken to have ended in any kind of final agreement. The papers have not yet arrived to tell the result of that case.

What I want to present to you is this: Here is a Court which in the first two years of its existence has handed down nine opinions. All nine of those opinions have been promptly accepted and promptly acted upon by the parties in interest.

OTHER CASES AIDED BY THE COURT

But that is not all. I think that the Court is having an indirect influence on the conduct of foreign affairs which is quite as important as its direct influence. I want to remind you of three news items of the last few weeks, all having to do with the Court.

First you will recall that a few days ago a Yugoslav officer, a military attaché, was attacked in Bulgaria.² Immediately the Bulgarian government, having in mind the recent difficulties between Greece and Italy, offered to make amends for the attack. Bulgaria said in effect: "We recognize that some kind of indemnity must be paid, and we propose to go to the Permanent Court of International Justice to determine how much." The Serb government agreed to that, though the final result of the negotiation is not yet clear.

A second case: You will recall that we have been reading lately of the dispute between France and Switzerland with reference to the free customs zone in Upper Savoy. The French government announced not long ago that on December 15 it would put into operation there the regular French customs regime. For a whole century there have been these free zones in Upper Savoy, and I know something myself of the attitude of the people there toward any attempt to end them. The Swiss government promptly suggested that the question was a legal question and should therefore be submitted to the Permanent Court of International Justice.³ The matter is still in the stage of diplomatic negotiation.⁴

A third case: In the Corfu crisis, the settlement that was drawn up in the Council of the League of Nations and the first settlement agreed to by the Conference of Ambassadors both provided that the amount of the indemnity payable by Greece to Italy should be determined by the Permanent Court of International Justice.⁵ I regret to say that that provision was washed out in the progress of the negotiations. But I thought it quite important that the Court should have served as an instrument which unquestionably facilitated the handling of that delicate matter.

In all three of those cases, the Yugoslav-Bulgarian case, the Franco-Swiss case, the Greco-Italian case, it seems clear to

² *New York Times*, November 4, 1923, I, pt. 2, p. 6; November 5, 1923, p. 2.

³ *Ibid.*, October 13, 1923, p. 15.

⁴ See *ante*, pp. 123-124.

⁵ *League of Nations Off. Jour.*, November, 1923, pp. 1295, 1306.

me that the foreign offices of the world have at last begun to realize that there is a new institution in existence, an institution that can serve a very helpful purpose in connection with their settlement of diplomatic problems even though such problems are not handed over to the Court for actual adjudication.

So I submit that we may say, as a result of the nine cases which I have reviewed in which the Court has handed down opinions — I call the refusal to give an opinion in the Finnish-Russian case an “opinion,” because the Court called it such — as a result of the three cases in which it has not given opinions and of many instances in addition to these three where the foreign offices have seized upon the existence of the Court for aid in the settlement of their disputes, I submit that we may say that the world has achieved a great progress since the end of the war.

THE QUESTION BEFORE AMERICA

But there are still some of my friends who talk as if there were before the world a question of *establishing* an international court. There is no such question to-day. Forty-seven nations have signed the protocol of signature setting up *this* Court.⁶ Fifty-four nations are to-day supporting it, out of their treasuries. It is a court open to any nation of the world, member of the League of Nations or non-member of the League of Nations, on terms of perfect equality. It seems to me to satisfy the general requirements of a world tribunal.

Not only that, but it seems to me to represent a very logical development and fulfilment of what we have been working for in America for the last generation. Our representatives at the Hague Conference of 1899 and at the Hague Conference of 1907 were working for the establishment of a tribunal exactly on this order. In fact, the tribunal has re-

⁶ For an up-to-date list of signatures and ratifications, see Appendix G, *post*, p. 334.

cently been called by a distinguished English lawyer, "a replica of the Supreme Court of the United States."

Now, the Court being in existence, it being a world court, forty-seven nations having got over the great controversy that prevented us from establishing it before the war, does it not seem a very proper thing for the President of the United States to suggest, as he did, on February 24 last, that the United States should give its support to the maintenance of this institution?

I had the pleasure of speaking here on the very day that the President's proposal was published, the 24th day of last February. I think I mentioned, without knowing the nature of his proposal, conditions very similar to those which Mr. Hughes himself had suggested to President Harding. When the President's proposal was first made there was general acclaim, so far as my contacts went; general acclaim that this represented the fulfilment of an American idea, an American ambition, an American aspiration. But somehow or other, as so frequently happens in these cases, the atmosphere seems to have thinned out very greatly since the 24th day of February. Opposition which would then have been resented by many people has now come to have a place in our newspapers which must surprise many of us who recall the original enthusiasm for President Harding's proposal.

I would like to take a few minutes to discuss with you the development of that opposition during this period. We are now living over again the comedy which we lived through in 1919 and 1920 with reference to the League of Nations.

OBJECTIONS BEING ADVANCED

We now hear Senators say: "We are in favor of *a* court, but not in favor of *the* Court. Of course, we want an international tribunal; the United States has stood for it for a generation; we ourselves have been talking about it for a generation. But this is not the tribunal that we want. So we are going to ask the forty-seven peoples who are parties to the protocol

under which this Court is maintained, to abandon their effort altogether and set up something that will be very much better and that will somehow satisfy the susceptibilities of the American people."

Let us review some of those susceptibilities. In the first place, we were told by Senator Borah in the spring that since this Court does not have complete compulsory jurisdiction, it should not have American support. Well, if anyone here will take the trouble to review the history of the United States for a generation, he will see that the United States has consistently opposed the conferring of compulsory jurisdiction on an international tribunal. We opposed it by the reservations that we adopted in accepting the Conventions for Pacific Settlement of International Disputes, under which the Permanent Court of Arbitration was established at The Hague. We adopted those reservations both in 1899 and in 1907. I, too, would like to enlarge the jurisdiction. I regret the decision that was taken to cut that feature out of the Statute as it was originally proposed by the Commission of Jurists. But I do not ever expect fifty odd nations in the world to embody all of my ideas in the plan for any court they may create. I always expect to have to give up some of my ideas in order that we may get an institution established. But Senator Borah neglects the fact, as it seems to me, that the new Court has a great deal of compulsory jurisdiction.

And Senator Borah and some of his friends also object to this Court because its creation was not preceded by a codification of international law. That is an expression which I find it very difficult to understand, as many of my friends use it. Some of them talk as if it were possible somehow for a few lawyers to get together, and at nine o'clock on some morning to announce that all international law is now codified so that the generations of the future will be able to know exactly what it is. I need not tell you that I am opposed to any such attempt at codification. There is a process of codification under way to-day at Geneva, however, and a great many in-

ternational conferences have been adding to the stock and store of our international law for a period of four full years.

Then President Harding felt it necessary, as he said in his address in St. Louis on June 21, "for the sake of party harmony," to make certain compromises with reference to his own position. I will deal with his principal proposal. He proposed that this Court be made self-perpetuating.

What would you say if I came here to-day with a proposal that the Supreme Court of the United States be made self-perpetuating? My own researches have not gone very far, but so far as I am able to learn there has been no instance in modern history of any self-perpetuating court. At the time of the French Revolution the French courts were criticized as being self-perpetuating, but I think that term could not properly be applied to them.

I think it is obviously impossible for us to say to forty or more nations of the world: "Give up the voice that you now have in electing these judges. To be sure, we battled over this question for an entire generation. You won a certain position which you now prize very highly. But you must now give up that position in order that the judges of this Court may choose their own successors." That proposal of the President is no longer, I think, a subject of debate.

Then Senator Moses of New Hampshire made a very revealing speech in New York about three weeks ago. Senator Moses suddenly discovered that we did not need the Permanent Court of International Justice at all; that it is an entire superfluity, because there exists in the world, he said, the Permanent Court of Arbitration established in 1899.

Well, it was quite obvious to anyone reading Senator Moses's speech, that he had not paid any attention to the details of the Convention for the Pacific Settlement of International Disputes, setting up the Permanent Court of Arbitration. He misconceived its nature altogether. The Permanent Court of Arbitration, the existence of which I gladly acclaim, for it has rendered useful service in eighteen cases

in the last twenty-four years, is a court in name only. It is nothing but a roster of one hundred and thirty-two names.⁷ It is nothing but a list of men who may serve as arbitrators if they are called upon to arbitrate a particular case. I am very glad we have that list, but it was recognized at the time it was established in 1899, and again in 1907, that it was not adequate to meet the world's needs with reference to agencies for the adjudication of international disputes. It is no more adequate to-day than it was then. But it has long been recognized by every government of the United States in the last twenty years, that we need, in addition to the Permanent Court of Arbitration, a tribunal of permanent judges, always on the job, always ready to hear any case that may come to them, and building up, as the years roll on, a cumulating body of international case law.

CHANGES PROPOSED

Then I come to a suggestion which has recently been made by my friend Senator George Wharton Pepper of Philadelphia. Senator Pepper likes this Court very much. I think he is very genuine in his public announcements that he feels that the world needs this Court. But in order to satisfy some of his friends among his colleagues he made a proposal a few days ago that since the United States cannot possibly participate in the Council and Assembly of the League of Nations in the election of the judges, as Mr. Hughes proposed, we should slightly amend the Statute of the Court so as to call those two bodies by different names. He would leave the two bodies just as they are; he would have them meet at Geneva, as I understand it; he would have them elect the judges. But he wants them called by other names.

In other words, in order that the susceptibilities of a small group of people in the United States may be saved in this matter, in order that our treaty-making machinery may be

⁷ The list found in the *Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage*, 23me année, pp. 33-37, contains 148 names.

a little bit more easily put into operation, Senator Pepper would call upon forty-seven peoples of the earth to put into operation their own treaty-making machinery to change the names of these two bodies that are electing the judges.

I think it would be a very undignified proposal indeed, and a proposal which would readily be misunderstood by the forty-seven nations that are already parties to this protocol.

But I want to discuss a little more in detail the proposal of Senator Lenroot, which has now been introduced into the Senate, and of which our chairman, Mr. Victor Elting, has already spoken. Senator Lenroot's proposal is slightly different. He says in effect: "We will create two groups of states: Group A and Group B. Group A will be the large Powers, and the United States will name them. Group B will be the smaller Powers and it will take in everybody. We will have the judges elected by Group A acting instead of the Council of the League, and by Group B acting instead of the Assembly of the League." It seems a very simple proposal. What does it involve? At the present time the Council of the League of Nations is composed of four so-called Great Powers, Great Britain, France, Italy, Japan, and of the following Powers representing all the others: Belgium, Spain, Czechoslovakia, Uruguay, Brazil, Sweden. We would be saying to these people, to the Belgians, the Spaniards, the Czechs, the Uruguayans, the Swedes,— not to the Brazilians because Senator Lenroot would include Brazil as a Great Power,— "Give up the voice that you have. You now participate in the Council and the Assembly. We want you in the future to participate only in the Assembly."

Now, my friends, all of you know that the one thing that prevented our getting the Permanent Court of International Justice in 1907 was the impossibility of reaching a successful compromise between the political dogma of state equality on the one hand, and the political fact of the hegemony of the Great Powers on the other hand. You know that when Mr. Root went to The Hague in the summer of 1920 as a member

of the Commission of Jurists, the first thing he proposed was that we get over this old reef upon which all of our efforts were shipwrecked before, by using a successful compromise already established. In other words, it was the device by which the Assembly and the Council of the League were organized which represented the advance of 1920 over 1907, and which has enabled us to get an agreement since 1920 among forty-seven peoples of the world. And yet Senator Lenroot proposes that the United States shall throw over all of this, and that we shall face the turmoil of asking forty-seven states to revise the Statute of the Court in order that Group A and Group B may do the selecting of the judges.

Now, does anybody propose, does Senator Pepper propose, or does Senator Lenroot propose, that their suggestions make this Court able to perform its functions as an independent judicial tribunal more efficiently? Not at all. And there is nothing in any of the suggestions that are current to-day, that I can see, that would add in the slightest to the ability of this Court to serve as an independent judicial international tribunal.

There was a suggestion going around last spring — one does not hear it now — that because the Court had a jurisdiction to give advisory opinions to the Council and Assembly of the League of Nations, it was therefore a tool, a sort of private adviser, of the League of Nations. None of us lawyers who are familiar with the jurisdiction of many American supreme courts to give advisory opinions have ever entertained such a view. The Supreme Court of Massachusetts, for instance, has had a jurisdiction of that sort since 1780. And yet it was seriously contended by many people a few months ago that because this Court could give advisory opinions it was not a judicial tribunal.

What I lay before you is this: the record of the Court to date, the attitude of the judges in the discharge of their functions in nine different cases, the attitude of the foreign offices of the world in bringing in this Court in negotiation

at certain stages of their efforts to reach the settlement of difficult questions. I think these should leave no doubt in our minds that the Court is the independent tribunal for which the United States has been working for a generation.

My second proposition is that none of the proposals that have been made, with the single exception of the proposal for compulsory jurisdiction, would in any way increase the possibility of this Court's serviceability in the future.

It seems to me that a great smoke-screen has been erected in front of this proposal during the past few months. The American people are now being asked to line up on different sets of reservations with reference to the Court, precisely as they were asked to line up on different sets of reservations with reference to the League of Nations. With reference to the League of Nations, it was contended that we should undertake certain obligations. With reference to the Court, what should we undertake if we carried out Mr. Hughes's and President Harding's proposal? We should simply say: "The United States wants to have a part in maintaining this institution. The United States wants the world to know that our moral influence is behind this Court, in the effort of the nations of the world to reach some peaceful settlement of their international disputes."

I think that the generation of which we are a part has a very special opportunity, and I submit to you that our opportunity is about to be thrown away by Senators who are professing to favor *an* international court without ever taking a practical step that would enable us to support *this* Court.

XIII

LAWYERS' RECEPTION OF THE COURT¹

MR. CHAIRMAN and gentlemen of the committee: It is a great privilege indeed to appear before your committee to present my views on the proposed adhesion of the United States to the protocol of signature of the Permanent Court of International Justice.

As a student and a professor of international law, I am naturally interested in any movement that has in it prospect for extension of the field of justice according to law. I am particularly interested, because my specialty happens to be the international field, in any movement which may hold any prospect of an extension of the field of law and order in international society; and I am interested in the proposal made by the President and the Secretary of State because it seems to me to relate to building up our machinery for extending the field of law and order.

I have endeavored during the last few years to make a study of that machinery as it exists, and of its functioning. I have also attempted, in connection with the Court, to maintain contacts with lawyers in this country and in other countries, and have attempted to know what it is that they are thinking about this subject.

I have but recently had the pleasure of addressing the Missouri Bar Association, the Ohio Bar Association, and the Bar Association of the City of Boston; and, wherever I have gone in the United States among lawyers, I have found that the sentiment is overwhelmingly that of the resolution of the

¹ Extracts from remarks before a sub-committee of the Committee on Foreign Relations of the United States Senate, Washington, May 1, 1924, corrected from the stenographic notes published in the "Hearings."

American Bar Association adopted at Minneapolis last summer. In all the bar associations that I have mentioned, and in numerous others which have recently adopted resolutions — the Nevada Bar Association, the Oregon Bar Association, the Erie County Bar Association, the New York State Bar Association, the Mississippi Bar Association — there has been an overwhelming demand that the support of the United States should be given to maintaining the new Permanent Court of International Justice. Indeed, I think this was to be expected of American lawyers, in view of the history of the last generation with reference to this subject.

Among lawyers in other countries it has been my privilege to have certain contacts during the last five years, first at the Peace Conference and later at the various international conferences that have been held since the Peace Conference, and I think I should be safe in reporting to you that it is the overwhelming view of the lawyers that I have met from other countries that an excellent beginning has been made by the Permanent Court of International Justice. I think I am safe in reporting to you that the lawyers of other countries are, as a body, hopeful about our new approach to international justice. . . .

When the jurists met at The Hague in 1920, they proceeded immediately to adopt as the basis of their deliberations that plan which had been drawn up at the second Hague Conference in 1907. Their first act was to adopt this plan of 1907 as a basis of discussion.

The Statute which was drawn in 1920, then, represents a continuation of ideas which had been current in the world, which had been espoused by the United States for a generation prior to that time.

SENATOR SWANSON. What striking parts of the plan of 1907 or the second Hague Conference were included in the plan of 1920 which constituted the Court?

PROFESSOR HUDSON. The general procedure of the Permanent Court of International Justice, Senator Swanson, is

precisely that which had been outlined for the Court of Arbitral Justice in 1907. The significant difference between the two is, of course, the method of choosing the judges of the new Court.

SENATOR SWANSON. What was the difference in connection with the rules prescribed for the determination of questions?

PROFESSOR HUDSON. The new Statute of the Permanent Court of International Justice is much more explicit than the second Hague Conference had attempted to make its definition of the jurisdiction of the Court of Arbitral Justice. I think that everyone has agreed throughout the discussions that this is a big improvement on the 1907 draft, though it follows in the main the lines of the 1907 draft.

What we are doing, therefore, at the present time, is to carry on an institution which had its beginning in the Hague Conferences. I think one may say that we are simply carrying out the ideas of the two Hague Conferences.

It was my purpose, however, to speak more specifically. I take it that your deliberations have already covered the content of the Statute of the Court, and the content of the protocol by which that Statute has life breathed into it. I want to speak more specifically of what has happened in the three years since 1920, when the protocol was drawn up.

In 1921, we succeeded in getting a sufficient number of ratifications of the protocol for the protocol to come into force, and the first election of the judges was held in September, 1921. The election went off very smoothly, indeed. It was a difficult job. There were eighty-nine candidates nominated by members of the Permanent Court of Arbitration. It was a difficult task to fill the fifteen posts — eleven judges and four deputy judges — but it went off with surprising smoothness, and at the end of 48 hours after the election began, the election was completed, and there was general satisfaction with the result. Among my friends at the bar in other countries I have frequently asked the question how they are satisfied

with the personnel of the new Court, and I have always had the reply that they are entirely satisfied with the judges who were elected at that time.

I think one can say that the eleven judges represent about as nearly as would be possible the different systems of law in the world, and the judges are all leading jurists in their respective countries.

May I just go through the roster of judges, Mr. Chairman? — because on occasion I have heard it said in this country that we were uncertain as to who the judges are.

Judge Loder, the president of the Court, was president of the Supreme Court of the Netherlands. I have known him for a number of years. He is a man of excellent judgment and of wide learning, and the administrative responsibilities of the Court could not be in better hands.

Judge Weiss is from France, a professor of law at the University of Paris. It was my privilege for six months during the Peace Conference to sit next to him at the table. He is a man of overwhelming erudition. He has the confidence of the French Foreign Office. He has the confidence of lawyers throughout Europe, and we in this country often use his book on private international law. It is the leading authority outside of the Anglo-American world.

Lord Finlay I need not mention, because he is known to us as the Lord Chancellor of England, and his opinions are known wherever the common law is studied.

Judge Barbosa has now been succeeded by Judge Pessôa, of Brazil, who took part in the elaboration of the Statute of the Court, who has held high office in his country, and who is one of the most respected jurists in South America.

Judge Nyholm is not known to me so well personally. I have met him on several occasions. He has taken part in a number of international arbitrations in the past, and is very much respected in his own country and abroad.

Judge Moore is, I think, an outstanding member of the Court, as befits our country.

Judge Bustamante is very well known to American lawyers. He has a large practice in Havana, which brings him to various parts of the United States.

Judge Altamira is a professor at Madrid, and one of the leading legal scholars of the Continent of Europe.

Judge Oda, the Japanese jurist, was a professor at the University of Kyoto. I know that the Japanese respect him very highly.

Judge Anzilotti, of Italy, I know very well, indeed. He is one of the best critical jurists on the Continent of Europe. He is an editor of the *Italian Review of International Law*, and his name is known wherever international law is studied. He is widely known as a professor at the University of Rome.

Judge Huber, of Switzerland, has been my friend for a number of years. I think no man on the Continent of Europe holds a higher position in continental scholarship than Max Huber. He has been a professor of law at the University of Zurich. He was throughout the war legal adviser to the Swiss Foreign Office, and it was in that connection that I first met him at the Paris Peace Conference. I have dealt with him on various international problems, particularly the questions relating to the Rhine, and I have found him erudite, able, a man of excellent judgment and good sense.

Among the deputy judges I would speak specially of Judge Wang, who is interesting to us because I take it that, when any of you gentlemen have to use the German code, you use Judge Wang's translation of it into English. In other words here is a man schooled in the Chinese law, also a student of our law at Yale University, also a student of the German law at the University of Berlin, who made the standard translation of the German code from German into English. . . .

The first meeting of the Court was held in February, 1922, and at that time the rules of the Court were drawn up and promulgated. . . . The rules have met with general satisfaction. It is quite possible for the Court to change them,

and I think in the future changes undoubtedly will prove necessary; but up to the present time they have worked very well indeed.

Two years ago I was of the opinion that the Court might have very little to do during the early period, and I often recited the early history of the Supreme Court of the United States, which, you will recall, met in Philadelphia five times before it had any contested case to hear. It was not until the sixth meeting of the Supreme Court of the United States that it had a contested case; and yet I think it was a very important thing in the life of our young Republic that the judges should have gone on meeting in Philadelphia every February and every August during 1790, during 1791, and during 1792, whether there was any business to be done or not. So I found satisfaction in that provision in the Statute of the Court which requires that the judges meet at The Hague on the 15th day of every June, whether there is any business to be done or not. But in the first two years the Court has had so much business that it was necessary for it to have three extra sessions. . . .

In two years, 1922, 1923, nine questions have come before the Court. All nine of them have been carefully deliberated upon, carefully argued by competent counsel. The most eminent lawyers in the world have appeared before the Court. Sir Ernest Pollock, formerly Attorney-General of England, appeared before the Court in one of the Polish cases. The bar of the world has received the Court into the judicial system of our time.

What are we then to say?

I think there is no body of lawyers in the world who would like to see the Permanent Court of International Justice go out of existence. I believe there is no bar in the world that does not welcome the Permanent Court of International Justice as a great addition to our machinery for the administration of justice according to law.

The United States has an opportunity, not to participate in establishing a court, for that exists to-day through the suffrage of forty-seven nations. Our present opportunity is merely to give our support, our moral support, our financial support, our official support, to an institution that is already established, that is already functioning, and that has already begotten high hopes among the lawyers of the world.

XIV

THE COURT AS AN AGENCY OF PEACE¹

IT may reasonably be anticipated that the Permanent Court of International Justice will contribute to the maintenance of the world's peace in three ways:

(1) In its decision of disputes and vexed questions as they arise;

(2) In building a cumulating body of international case law; and

(3) In facilitating the settlement of problems directly handled by the foreign offices.

Each of these three contributions is possible, although the Court has only a limited jurisdiction, which for twenty-six of the forty-seven signatories cannot be said to be compulsory.² It is quite unnecessary to exaggerate the prospects, therefore, in order to maintain that the Court promises to render distinct service within its limited field.

(1) In the judgments which it will render in cases submitted to it, its utility is obvious. In the one contested case which has come before it, to date, — the Kiel Canal dispute between Great Britain, France, Italy, Japan, and Poland on the one hand, and Germany on the other hand, — the decision of the Court put at rest a controversy which the foreign offices had failed to settle through many months of negotiation. It seems probable that many other cases of a similar nature will arise in the future, and the Court's handling of them is distinctly provided for in many treaties. Twenty-one states have accepted the optional clause of the protocol conferring compulsory jurisdiction in specified groups of cases, and nu-

¹ An Address before the American Academy of Political and Social Science, in Philadelphia, May 17, 1924. Reprinted, with slight revision, from the *Annals of the Academy*, July, 1924, pp. 122-125.

² On December 1, 1924, there were forty-eight signatories. See *post*, p. 334.

merous other treaties like the minorities treaties and the recent conventions promulgated by League of Nations conferences confer additional jurisdiction on the Court.

VALUE OF ADVISORY OPINIONS

It is fortunate, however, that we do not need to await acute and ripened controversy for the Court's service to be availed of. It may give advisory opinions at the request of the Council or Assembly of the League of Nations. Our experience to date indicates that this may prove a big enlargement of the Court's opportunity for service. Eight questions have been submitted by the Council during the first two years, and in seven instances the opinion of the Court has been an important factor in the settlement of existing differences. It seems probable that the Council will continue to exercise its competence to request such opinions, as differences arise before it.

The Court has clearly shown that its jurisdiction to give advisory opinions will be exercised in a thoroughly judicial manner. Indeed, there can be no doubt about this since the refusal in 1923 to give an opinion on the Eastern Carelia question. The doubts that existed in the beginning as to how these opinions might be given ought to be thoroughly dissipated by the Court's action in framing the rules of court, by its refusal to give an opinion in the one case, and by its procedure in the seven cases in which opinions have been handed down. For each of the seven opinions has involved the settlement of an issue which has arisen in practical affairs; in each case the Court has heard thorough argument on behalf of all interests that requested to be heard; in each case the judges have taken time for careful deliberation; and in each case the whole proceeding has been public in such a way as to fasten a feeling of responsibility on the judges. Under these circumstances, it seems quite idle to make the oft-repeated statement that the Court does not exercise a judicial function in giving advisory opinions.

It is true that the larger political questions about which nations might go to war will not generally come before the Court. But most of these involve legal phases, also, and frequently a wise handling of some subsidiary legal problem may contribute to the pacific handling of the political situation. War is often the result of the statesman's having no expedient at hand to try. The Court offers that expedient, at least with reference to the legal questions usually incident to major disputes.

Moreover, the successful handling of disputes which are susceptible of legal formulation will tend to reduce the number of points of international friction and will increase general confidence in the efficacy of peaceful settlement. As the decisions and opinions accumulate, therefore, willingness to resort to the Court should grow and the range of its action should widen.

OPPORTUNITY TO BUILD PERMANENT BODY OF CASE LAW

(2) It is the chief advantage of a permanent staff of judges that their work together will tend to build traditions for the Court, will enable them to develop a technique of working together, and will infuse continuity into the results of their work. Useful as have been the tribunals of the Permanent Court of Arbitration in the eighteen cases which were handled by them, few traditions grew up about their work, and except for the functioning of their permanent Bureau, each arbitration was more or less unique. The arbitrators were usually compelled to work out their own methods of procedure, though the various *compromis* more or less followed the same mold. The opinions had few common threads running through them, also. So that, while the opinions and awards in the eighteen cases do constitute an important contribution to international law, they represent no systematic effort to that end.

The judges of the new Court have a greater opportunity

for continuous effort to produce a body of case law. In certain fields, like that of protecting minorities, they will undoubtedly handle related problems. Two of the opinions already handed down related to the Polish Minority Treaty, for instance. The judges' nine-year terms and their freedom from other duties should enable them to do their work systematically also.

The opinions of the Court should in time build a structure of international constitutional law which will add greatly to the efficiency of existing international institutions. The first three opinions of the Court related to the functioning of the International Labor Conference and gave it solutions of problems which threatened its usefulness. In the same way, the opinion about the Tunis-Morocco dispute between Great Britain and France gave an authoritative interpretation of language in the Covenant of the League of Nations as it applied to that dispute; and the two opinions concerning the Polish Minority Treaty helped to define the extent of the Council's competence under all the minority treaties. Not only the various organs of the League of Nations, but also other bodies, like the Institute of Agriculture and the Universal Postal Union, may find themselves aided by being able to submit legal tangles to the Court through the proper channels.

The much-discussed provision in the Statute of the Court, that decisions of the Court are not to become binding as precedents, does not stand in the way of the Court's building this new edifice of international law. For this provision merely excludes the application of the Anglo-American doctrine as to the binding force of precedent. It means that the civil-law as opposed to the common-law approach is to be followed, by which new cases are not controlled by past decisions. In practice, it seems probable that the Continental lawyers who have the civil-law approach and the American lawyers who have the common-law approach will reach approximately the same results. At any rate, the Court is not

precluded by this article in its Statute from pyramiding its doctrines, nor from following out with reasonable continuity certain lines of decision.

In this connection, reference may be made to the importance of not exaggerating the difference between arbitration and adjudication. A notion has recently been current in America that the former necessarily involves a larger element of compromise and that arbitrators do not feel themselves bound by law, while adjudication involves only the automatic application of ready-made law by judges who are not legislators and who operate more or less mechanically within fixed limitations. If there is some truth in this, it is nevertheless generally true that the two processes do not greatly differ. In both, trained lawyers will feel bound to follow ascertained law in most cases, and in both, trained minds will travel the same roads to "find" the law that is applicable. Our recent history does not bear out the distinction as it is frequently expressed in America.

AID TO THE FOREIGN OFFICES

(3) The existence of the Permanent Court of International Justice has a wider influence, however, than that of the Court's direct contributions. For it constitutes an important political fact which the foreign offices must take into account in their own labors, even when they do not shift their responsibility to the Court. Thus it seems probable that public opinion will insist that attempts be made at judicial settlement in many cases, and such insistence will be in itself a factor tending to produce agreement. It may also be true that a proposal by one party to a dispute that the Court be used will tend to make agreement easier. In other words, one more expedient, one more proposal, one more piece of machinery stands between the peoples and war. A new ground for continuing discussion exists, and in some instances it may give the diplomats the instrument of delay and of definition which will enable them to forestall breaks.

Several recent instances illustrate the value of the Court from this point of view. Late in 1923, when a Yugoslav attaché was attacked in Bulgaria, the Bulgarian government at once proposed resort to the Court to determine the amount of the indemnity to be paid; and though no such resort was agreed upon, the proposal did lend a point for deliberation when the atmosphere of discussion was tense. So in the dispute between Switzerland and France concerning the abolition of the free zones in Upper Savoy, late in 1923, Switzerland proposed the submission of the dispute to the Court, and thus created a new area for discussion.

But the references to the Court in the negotiations at the time of the Corfu crisis are most instructive. Throughout that troubled period, the existence of the Court and its readiness to be availed of was a factor tending toward the continuance of calm discussion and the drafting of possible compromises. Practically every scheme of settlement proposed included some provision for the aid of the Court. And the settlement proposed by the Council of the League and adopted by the Conference of Ambassadors provided for the Court's determination of the amount of the indemnity to be paid by Greece to Italy. This provision was later dropped, and no question was sent to the Court. A struggle in the Council of the League about the proposal to request the Court for an interpretation of the Covenant ended in the Council's creating a special committee of jurists for that purpose. Tracing through the entire negotiations, it seems indisputable that the existence of the Court increased the general confidence in the possibility of a peaceful settlement and made it more difficult for Italy to remain in Corfu in defiance of world opinion.

So the Court's contribution is not limited to what the Court does — it includes also what the foreign offices do as a consequence of the Court's existence, in their own handling of international differences.

In these three ways, then, the Permanent Court of International Justice serves the world to-day as an agency for the promotion of peace. If it may not be hailed as a substitute for war, it can at least be welcomed as a firm support for the peace of the future.

APPENDICES

A

CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES, SIGNED AT THE HAGUE, OCTOBER 18, 1907¹

PART I. THE MAINTENANCE OF GENERAL PEACE

ARTICLE 1. With a view to obviating as far as possible recourse to force in the relations between States, the *contracting* Powers agree to use their best efforts to insure the pacific settlement of international differences.

PART II. GOOD OFFICES AND MEDIATION

ARTICLE 2. In case of serious disagreement or dispute, before an appeal to arms, the *contracting* Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

ARTICLE 3. Independently of this recourse, the *contracting* Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

ARTICLE 4. The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

¹ This translation is taken from 36 U. S. Stat. at Large, pp. 2212-2236. See also Scott, *The Hague Conventions and Declarations of 1899 and 1907*, pp. 42-81. The italics indicate changes made in the Convention signed at The Hague, July 29, 1899.

The *Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage* for 1923 indicates that the convention has been signed by forty-four states, of which twenty-seven have ratified, as follows (italics indicate ratification): Argentine Republic, *Austria, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Haiti, Hungary, Italy, Japan, Luxemburg, Mexico, Montenegro, Netherlands, Norway, Panama, Paraguay, Persia, Peru, Portugal, Roumania, Russia, Salvador, Serbia, Siam, Spain, Sweden, Switzerland, Turkey, United States of America, Uruguay, Venezuela.* In addition, Czechoslovakia, Finland, Nicaragua and Poland have adhered to the Convention. (It is also to be noted that the Convention for the Pacific Settlement of International Disputes, of July 29, 1899, may be in force for certain states.)

ARTICLE 5. The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

ARTICLE 6. Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice, and never have binding force.

ARTICLE 7. The acceptance of mediation can not, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.

ARTICLE 8. The *contracting* Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering peace, the States at variance choose respectively a Power, to which they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, can not exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

PART III. INTERNATIONAL COMMISSIONS OF INQUIRY

ARTICLE 9. In disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the *contracting* Powers deem it expedient and *desirable* that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

ARTICLE 10. International commissions of inquiry are constituted by special agreement between the parties in dispute.

The inquiry convention defines the facts to be examined; *it determines the mode and time in which the commission is to be formed* and the extent of the powers of the commissioners.

It also determines, if there is need, where the commission is to sit, and whether it may remove to another place, the language the commission shall use and the languages the use of which shall be authorized before it, as well as the

date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.

If the parties consider it necessary to appoint assessors, the convention of inquiry shall determine the mode of their selection and the extent of their powers.

ARTICLE 11. *If the inquiry convention has not determined where the commission is to sit, it will sit at The Hague.*

The place of meeting, once fixed, can not be altered by the commission except with the assent of the parties.

If the inquiry convention has not determined what languages are to be employed, the question shall be decided by the commission.

ARTICLE 12. Unless an undertaking is made to the contrary, commissions of inquiry shall be formed in the manner determined by Articles 45 and 57 of the present Convention.

ARTICLE 13. *Should one of the commissioners or one of the assessors, should there be any, either die, or resign, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.*

ARTICLE 14. *The parties are entitled to appoint special agents to attend the commission of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.*

They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interests before the commission.

ARTICLE 15. *The International Bureau of the Permanent Court of Arbitration acts as registry for the commissions which sit at The Hague, and shall place its offices and staff at the disposal of the contracting Powers for the use of the commission of inquiry.*

ARTICLE 16. *If the commission meets elsewhere than at The Hague, it appoints a secretary general, whose office serves as registry.*

It is the function of the registry, under the control of the president, to make the necessary arrangements for the sittings of the commission, the preparation of the minutes, and, while the inquiry lasts, for the charge of the archives, which shall subsequently be transferred to the International Bureau at The Hague.

ARTICLE 17. *In order to facilitate the constitution and working of commissions of inquiry, the contracting Powers recommend the following rules, which shall be applicable to the inquiry procedure in so far as the parties do not adopt other rules.*

ARTICLE 18. *The commission shall settle the details of the procedure not covered by the special inquiry convention or the present Convention, and shall arrange all the formalities required for dealing with the evidence.*

ARTICLE 19. *On the inquiry both sides must be heard.*

At the dates fixed, each party communicates to the commission and to the other party the statements of facts, if any, and, in all cases, the instruments,

papers, and documents which it considers useful for ascertaining the truth, as well as the list of witnesses and experts whose evidence it wishes to be heard.

ARTICLE 20. *The commission is entitled, with the assent of the Powers, to move temporarily to any place where it considers it may be useful to have recourse to this means of inquiry or to send one or more of its members. Permission must be obtained from the State on whose territory it is proposed to hold the inquiry.*

ARTICLE 21. *Every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.*

ARTICLE 22. *The commission is entitled to ask from either party for such explanations and information as it considers necessary.*

ARTICLE 23. *The parties undertake to supply the commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with, and to accurately understand, the facts in question.*

They undertake to make use of the means at their disposal, under their municipal law, to insure the appearance of the witnesses or experts who are in their territory and have been summoned before the commission.

If the witnesses or experts are unable to appear before the commission, the parties will arrange for their evidence to be taken before the qualified officials of their own country.

ARTICLE 24. *For all notices to be served by the commission in the territory of a third contracting Power, the commission shall apply direct to the Government of the said Power. The same rule applies in the case of steps being taken on the spot to procure evidence.*

The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They can not be rejected unless the Power in question considers they are calculated to impair its sovereign rights or its safety.

The commission will equally be always entitled to act through the Power on whose territory it sits.

ARTICLE 25. *The witnesses and experts are summoned on the request of the parties or by the commission of its own motion, and, in every case, through the Government of the State in whose territory they are.*

The witnesses are heard in succession and separately, in the presence of the agents and counsel, and in the order fixed by the commission.

ARTICLE 26. *The examination of witnesses is conducted by the president.*

The members of the commission may however put to each witness questions which they consider likely to throw light on and complete his evidence, or get information on any point concerning the witness within the limits of what is necessary in order to get at the truth.

The agents and counsel of the parties may not interrupt the witness when he is making his statement, nor put any direct question to him, but they may

ask the president to put such additional questions to the witness as they think expedient.

ARTICLE 27. *The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the president to consult notes or documents if the nature of the facts referred to necessitates their employment.*

ARTICLE 28. *A minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks necessary, which will be recorded at the end of his statement.*

When the whole of his statement has been read to the witness, he is asked to sign it.

ARTICLE 29. *The agents are authorized, in the course of or at the close of the inquiry, to present in writing to the commission and to the other party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth.*

ARTICLE 30. *The commission considers its decisions in private and the proceedings are secret.*

All questions are decided by a majority of the members of the commission.

If a member declines to vote, the fact must be recorded in the minutes.

ARTICLE 31. *The sittings of the commission are not public, nor the minutes and documents connected with the inquiry published except in virtue of a decision of the commission taken with the consent of the parties.*

ARTICLE 32. *After the parties have presented all the explanations and evidence, and the witnesses have all been heard, the president declares the inquiry terminated, and the commission adjourns to deliberate and to draw up its report.*

ARTICLE 33. *The report is signed by all the members of the commission.*

If one of the members refuses to sign, the fact is mentioned; but the validity of the report is not affected.

ARTICLE 34. *The report of the commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.*

A copy of the report is given to each party.

ARTICLE 35. *The report of the commission is limited to a statement of facts, and has in no way the character of an award. It leaves to the parties entire freedom as to the effect to be given to the statement.*

ARTICLE 36. *Each party pays its own expenses and an equal share of the expenses incurred by the commission.*

PART IV. INTERNATIONAL ARBITRATION

CHAPTER I. *The System of Arbitration*

ARTICLE 37. International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the award.

ARTICLE 38. In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the *contracting Powers* as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.

ARTICLE 39. The arbitration convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

ARTICLE 40. Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the *contracting Powers*, the said Powers reserve to themselves the right of concluding new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it.

CHAPTER II. *The Permanent Court of Arbitration*

ARTICLE 41. With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the *contracting Powers* undertake to *maintain the Permanent Court of Arbitration, as established by the First Peace Conference*, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention.

ARTICLE 42. The Permanent Court *is* competent for all arbitration cases, unless the parties agree to institute a special tribunal.

ARTICLE 43. The Permanent Court sits at The Hague.

An International Bureau serves as registry for the Court. It is the channel for communications relative to the meetings of the Court; it has charge of the archives and conducts all the administrative business.

The *contracting Powers* undertake to communicate to the Bureau, *as soon as possible*, a certified copy of any conditions of arbitration arrived at between them and of any award concerning them delivered by a special tribunal.

They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the awards given by the Court.

ARTICLE 44. Each *contracting* Power *selects* four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator.

The persons thus selected *are* inscribed, as members of the Court, in a list which shall be notified to all the *contracting* Powers by the Bureau.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the *contracting* Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. These appointments are renewable.

Should a member of the Court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. *In this case the appointment is made for a fresh period of six years.*

ARTICLE 45. When the *contracting* Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the arbitrators called upon to form the tribunal with jurisdiction to decide this difference must be chosen from the general list of members of the Court.

Failing the direct agreement of the parties on the composition of the arbitration tribunal, the following course shall be pursued:

Each party appoints two arbitrators, *of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court.* These arbitrators together choose an umpire.

If the votes are equally divided, the choice of the umpire is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

If, within two months' time, these two Powers can not come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be umpire.

ARTICLE 46. The tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court, *the text of their compromis, and the names of the arbitrators.*

The Bureau communicates without delay to each arbitrator the compromis, and the names of the other members of the tribunal.

The tribunal assembles at the date fixed by the parties. *The Bureau makes the necessary arrangements for the meeting.*

The members of the *tribunal*, in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities.

ARTICLE 47. The Bureau is authorized to place its offices and staff at the disposal of the *contracting* Powers for the use of any special board of arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to disputes between *non-contracting* Powers or between *contracting* Powers and *non-contracting* Powers, if the parties are agreed on recourse to this tribunal.

ARTICLE 48. The *contracting* Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

In case of dispute between two Powers, one of them can always address to the International Bureau a note containing a declaration that it would be ready to submit the dispute to arbitration.

The Bureau must at once inform the other Power of the declaration.

ARTICLE 49. The Permanent Administrative Council, composed of the diplomatic representatives of the *contracting* Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as president, is charged with the direction and control of the International Bureau.

The Council *settles* its rules of procedure and all other necessary regulations.

It *decides* all questions of administration which may arise with regard to the operations of the Court.

It *has* entire control over the appointment, suspension, or dismissal of the officials and employees of the Bureau.

It *fixes* the payments and salaries, and controls the general expenditure.

At meetings duly summoned the presence of *nine* members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the *contracting* Powers without delay the regulations adopted by it. It furnishes them with an annual report on the labors of the Court, the working of the administration, and the expenditure. *The report likewise contains a résumé of what is important in the documents communicated to the Bureau by the Powers in virtue of Article 43, paragraphs 3 and 4.*

ARTICLE 50. The expenses of the Bureau shall be borne by the *contracting* Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date on which their adhesion comes into force.

CHAPTER III. *Arbitration Procedure*

ARTICLE 51. With a view to encouraging the development of arbitration, the contracting Powers have agreed on the following rules, which are applicable to arbitration procedure, unless other rules have been agreed on by the parties.

ARTICLE 52. The Powers which have recourse to arbitration sign a compromis, in which the subject of the dispute is clearly defined, *the time allowed for appointing arbitrators, the form, order, and time in which the communication referred to in Article 63 must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.*

The compromis likewise defines, if there is occasion, the manner of appointing arbitrators, any special powers which may eventually belong to the tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

ARTICLE 53. *The Permanent Court is competent to settle the compromis, if the parties are agreed to have recourse to it for the purpose.*

It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of —

1. *A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a compromis in all disputes and not either explicitly or implicitly excluding the settlement of the compromis from the competence of the Court. Recourse can not, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question;*

2. *A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the compromis should be settled in some other way.*

ARTICLE 54. *In the cases contemplated in the preceding article, the compromis shall be settled by a commission consisting of five members selected in the manner arranged for in Article 45, paragraphs 3 to 6.*

The fifth member is president of the commission ex officio.

ARTICLE 55. The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present Convention.

Failing the constitution of the tribunal by direct agreement between the parties, the course referred to in Article 45, paragraphs 3 to 6, is followed.

ARTICLE 56. When a sovereign or the chief of a State is chosen as arbitrator, the arbitration procedure is settled by him.

ARTICLE 57. The umpire is president of the tribunal *ex officio*.

When the tribunal does not include an umpire, it appoints its own president.

ARTICLE 58. *When the compromis is settled by a commission, as contemplated in Article 54, and in the absence of an agreement to the contrary, the commission itself shall form the arbitration tribunal.*

ARTICLE 59. Should one of the arbitrators either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.

ARTICLE 60. The tribunal sits at The Hague, unless some other place is selected by the parties.

The tribunal can only sit in the territory of a third Power with the latter's consent.

The place of meeting once fixed can not be altered by the tribunal, except with the consent of the parties.

ARTICLE 61. *If the question as to what languages are to be used has not been settled by the compromis, it shall be decided by the tribunal.*

ARTICLE 62. The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to retain for the defence of their rights and interests before the tribunal counsel or advocates appointed by themselves for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.

ARTICLE 63. As a general rule, arbitration procedure comprises two distinct phases: pleadings and oral discussions.

The pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents called for in the case. This communication shall be made *either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the compromis.*

The time fixed by the compromis may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

The discussions consist in the oral development before the tribunal of the arguments of the parties.

ARTICLE 64. A *certified copy* of every document produced by one party must be communicated to the other party.

ARTICLE 65. *Unless special circumstances arise, the tribunal does not meet until the pleadings are closed.*

ARTICLE 66. The discussions are under the control of the president.

They are only public if it be so decided by the tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the secretaries appointed by the president. *These minutes are signed by the president and by one of the secretaries and alone have an authentic character.*

ARTICLE 67. After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

ARTICLE 68. The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

ARTICLE 69. The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the tribunal takes note of it.

ARTICLE 70. The agents and the counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defence of their case.

ARTICLE 71. They are entitled to raise objections and points. The decisions of the tribunal on these points are final and can not form the subject of any subsequent discussion.

ARTICLE 72. The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions, can be regarded as an expression of opinion by the tribunal in general or by its members in particular.

ARTICLE 73. The tribunal is authorized to declare its competence in interpreting the compromis, as well as the other treaties which may be invoked, and in applying the principles of law.

ARTICLE 74. The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, *order*, and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

ARTICLE 75. *The parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the case.*

ARTICLE 76. *For all notices which the tribunal has to serve in the territory of a third contracting Power, the tribunal shall apply direct to the Government of that Power. The same rule applies in the case of steps being taken to procure evidence on the spot.*

The requests for this purpose are to be executed as far as the means at the disposal of the Power applied to under its municipal law allow. They can not be rejected unless the Power in question considers them calculated to impair its own sovereign rights or its safety.

The Court will equally be always entitled to act through the Power on whose territory it sits.

ARTICLE 77. When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case the president shall declare the discussion closed.

ARTICLE 78. The tribunal considers its decisions in private and *the proceedings remain secret.*

All questions are decided by a majority of the members of the tribunal.

ARTICLE 79. The award must give the reasons on which it is based. *It contains the names of the arbitrators; it is signed by the president and registrar or by the secretary acting as registrar.*

ARTICLE 80. The award is read out in public sitting, the agents and counsel of the parties being present or duly summoned to attend.

ARTICLE 81. The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.

ARTICLE 82. *Any dispute arising between the parties as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the tribunal which pronounced it.*

ARTICLE 83. The parties can reserve in the compromis the right to demand the revision of the award.

In this case and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award and which was unknown to the tribunal and to the party which demanded the revision at the time the discussion was closed.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The compromis fixes the period within which the demand for revision must be made.

ARTICLE 84. The award is not binding except on the parties *in dispute.*

When it concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the signatory Powers *in good time.* Each of these Powers is entitled to intervene in the

case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

ARTICLE 85. Each party pays its own expenses and an equal share of the expenses of the tribunal.

CHAPTER IV. *Arbitration by Summary Procedure*

ARTICLE 86. *With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the contracting Powers adopt the following rules, which shall be observed in the absence of other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.*

ARTICLE 87. *Each of the parties in dispute appoints an arbitrator. The two arbitrators thus selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Permanent Court exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.*

The umpire presides over the tribunal, which gives its decisions by a majority of votes.

ARTICLE 88. *In the absence of any previous agreement the tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.*

ARTICLE 89. *Each party is represented before the tribunal by an agent, who serves as intermediary between the tribunal and the Government who appointed him.*

ARTICLE 90. *The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful.*

PART V. FINAL PROVISIONS

ARTICLE 91. *The present Convention, duly ratified, shall replace, as between the contracting Powers, the Convention for the pacific settlement of international disputes of the 29th July, 1899.*

ARTICLE 92. *The present Convention shall be ratified as soon as possible. The ratifications shall be deposited at The Hague.*

The first deposit of ratifications shall be recorded in a procès-verbal signed by the representatives of the Powers which take part therein and by the Netherlands Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherlands Government and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, and of the

instruments of ratification, shall be immediately sent by the Netherland Government, through the diplomatic channel, to the Powers invited to the Second Peace Conference, as well as to those Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph, the said Government shall at the same time inform the Powers of the date on which it received the notification.

ARTICLE 93. Non-signatory Powers which have been invited to the Second Peace Conference may adhere to the present Convention.

The Power which desires to adhere notifies its intention in writing to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall immediately forward to all the other Powers invited to the Second Peace Conference a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

ARTICLE 94. The conditions on which the Powers which have not been invited to the Second Peace Conference may adhere to the present Convention shall form the subject of a subsequent agreement between the contracting Powers.

ARTICLE 95. *The present Convention shall take effect, in the case of the Powers which were not a party to the first deposit of ratifications, sixty days after the date of the procès-verbal of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland Government.*

ARTICLE 96. In the event of one of the contracting Parties wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherland Government, which shall immediately communicate a duly certified copy of the notification to all the other Powers informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has reached the Netherland Government.

ARTICLE 97. *A register kept by the Netherland Minister for Foreign Affairs shall give the date of the deposit of ratifications effected in virtue of Article 92, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 93, paragraph 2) or of denunciation (Article 96, paragraph 1) have been received.*

Each contracting Power is entitled to have access to this register and to be supplied with duly certified extracts from it.

In faith whereof the plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the contracting Powers.

B

DRAFT CONVENTION RELATIVE TO THE CREATION
OF A PERMANENT COURT OF ARBITRAL JUSTICE,
ANNEXED TO THE FIRST *Vœu* CONTAINED IN
THE FINAL ACT OF THE SECOND INTERNATIONAL
PEACE CONFERENCE, THE HAGUE, OCTOBER 18,
1907¹

PART I. CONSTITUTION OF THE JUDICIAL ARBITRATION COURT

ARTICLE 1. With a view to promoting the cause of arbitration, the contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Judicial Arbitration Court, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of insuring continuity in jurisprudence of arbitration.

ARTICLE 2. The Judicial Arbitration Court is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention.

ARTICLE 3. The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention for the pacific settlement of international disputes. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

¹ This translation is taken from 2 Malloy, *Treaties and Conventions of the U. S.*, pp. 2380-2385. See also Scott, *The Hague Conventions and Declarations of 1899 and 1907*, pp. 31-39. The Draft Convention was annexed to the first *vœu* of the Conference, contained in the Final Act of October 18, 1907, as follows: "The Conference recommends to the signatory Powers the adoption of the annexed draft convention for the creation of a Court of Arbitral Justice, and the bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the Court." A text of the Final Act is also to be found in 2 Malloy, *Treaties and Conventions of the U. S.*, pp. 2369-2380.

ARTICLE 4. The judges of the Judicial Arbitration Court are equal and rank according to the date on which their appointment was notified. The judge who is senior in point of age takes precedence when the date of notification is the same.

The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

ARTICLE 5. The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must swear, before the Administrative Council, or make a solemn affirmation to exercise their functions impartially and conscientiously.

ARTICLE 6. The Court annually nominates three judges to form a special delegation and three more to replace them should the necessity arise. They may be reelected. They are balloted for. The persons who secure the largest number of votes are considered elected. The delegation itself elects its president, who, in default of a majority, is appointed by lot.

A member of the delegation can not exercise his duties when the Power which appointed him, or of which he is a national, is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

ARTICLE 7. A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge can not act as agent or advocate before the Judicial Arbitration Court or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

ARTICLE 8. The Court elects its president and vice-president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority and, in case the votes are even, by lot.

ARTICLE 9. The judges of the Judicial Arbitration Court receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins *per diem*. They are further entitled to receive a traveling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International Bureau

created by the Convention for the pacific settlement of international disputes.

ARTICLE 10. The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 11. The seat of the Judicial Court of Arbitration is at The Hague, and can not be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

ARTICLE 12. The Administrative Council fulfils with regard to the Judicial Court of Arbitration the same functions as to the Permanent Court of Arbitration.

ARTICLE 13. The International Bureau acts as registry to the Judicial Court of Arbitration, and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 14. The Court meets in session once a year. The session opens the third Wednesday in June and lasts until all the business on the agenda has been transacted.

The Court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the delegation may summon the Court in extraordinary session.

ARTICLE 15. A report of the doings of the Court shall be drawn up every year by the delegation. This report shall be forwarded to the contracting Powers through the International Bureau. It shall also be communicated to the judges and deputy judges of the Court.

ARTICLE 16. The judges and deputy judges, members of the Judicial Arbitration Court, can also exercise the functions of judge and deputy judge in the International Prize Court.

PART II. COMPETENCY AND PROCEDURE

ARTICLE 17. The Judicial Court of Arbitration is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement.

ARTICLE 18. The delegation is competent —

1. To decide the arbitrations referred to in the preceding article, if the parties concerned are agreed that the summary procedure, laid down in Part IV, Chapter IV, of the Convention for the pacific settlement of international disputes is to be applied;

2. To hold an inquiry under and in accordance with Part III of the said Convention, in so far as the delegation is intrusted with such inquiry by the parties acting in common agreement. With the assent of the parties concerned, and as an exception to Article 7, paragraph 1, the members of the delegation who have taken part in the inquiry may sit as judges, if the case in dispute is submitted to the arbitration of the Court or of the delegation itself.

ARTICLE 19. The delegation is also competent to settle the *compromis* referred to in Article 52 of the Convention for the pacific settlement of international disputes if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of —

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse can not, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

ARTICLE 20. Each of the parties concerned may nominate a judge of the Court to take part, with power to vote, in the examination of the case submitted to the delegation.

If the delegation acts as a commission of inquiry, this task may be intrusted to persons other than the judges of the Court. The traveling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

ARTICLE 21. The contracting Powers only may have access to the Judicial Arbitration Court set up by the present Convention.

ARTICLE 22. The Judicial Court of Arbitration follows the rules of procedure laid down in the Convention for the pacific settlement of international disputes, except in so far as the procedure is laid down in the present Convention.

ARTICLE 23. The Court determines what language it will itself use and what languages may be used before it.

ARTICLE 24. The International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 63, paragraph 2, of the Convention for the pacific settlement of international disputes.

ARTICLE 25. For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

ARTICLE 26. The discussions are under the control of the president or vice-president, or, in case they are absent or can not act, of the senior judge present.

The judge appointed by one of the parties can not preside.

ARTICLE 27. The Court considers its decisions in private, and the proceedings are secret.

All decisions are arrived at by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge, in the order of precedence laid down in Article 4, paragraph 1, is not counted.

ARTICLE 28. The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it; it is signed by the president and registrar.

ARTICLE 29. Each party pays its own costs and an equal share of the costs of the trial.

ARTICLE 30. The provisions of Articles 21 to 29 are applicable by analogy to the procedure before the delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of the member attached is not recorded if the votes are evenly divided.

ARTICLE 31. The general expenses of the Court are borne by the contracting Powers.

The Administrative Council applies to the Powers to obtain the funds requisite for the working of the Court.

ARTICLE 32. The Court itself draws up its own rules of procedure, which must be communicated to the contracting Powers.

After the ratification of the present Convention the Court shall meet as early as possible in order to elaborate these rules, elect the president and vice-president, and appoint the members of the delegation.

ARTICLE 33. The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the contracting Powers, which will consider together as to the measures to be taken.

PART III. FINAL PROVISIONS

ARTICLE 34. The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

ARTICLE 35. The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

C

COVENANT OF THE LEAGUE OF NATIONS¹

THE HIGH CONTRACTING PARTIES

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,

by the prescription of open, just and honourable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and

by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,

Agree to this Covenant of the League of Nations.

ARTICLE 1. The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant, and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accession shall be effected by a declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

ARTICLE 2. The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.

¹ This text is reprinted from the *League of Nations Off. Jour.*, i, 3-11. But modifications have been made from *Document Annexe à C. L. 136. 1924. V*, to include the amendments which came into force on August 13, 1924, and September 26, 1924. The French text is also authentic.

ARTICLE 3. The Assembly shall consist of representatives of the Members of the League.

The Assembly shall meet at stated intervals, and from time to time as occasion may require at the Seat of the League or at such other place as may be decided upon.

The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

At meetings of the Assembly each Member of the League shall have one vote, and may have not more than three Representatives.

ARTICLE 4. The Council shall consist of Representatives of the Principal Allied and Associated Powers, together with Representatives of four² other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Spain and Greece shall be Members of the Council.

With the approval of the majority of the Assembly, the Council may name additional Members of the League whose Representatives shall always be Members of the Council; the Council with like approval may increase the number of Members of the League to be selected by the Assembly for representation on the Council.³

The Council shall meet from time to time as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon.

The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.

At meetings of the Council, each Member of the League represented on the Council shall have one vote, and may have not more than one Representative.

ARTICLE 5. Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the As-

² This number was increased to six by a resolution adopted by the Third Assembly on September 25, 1922. The Council is now (December 1, 1924) composed of representatives of Belgium, Brazil, the British Empire, Czechoslovakia, France, Italy, Japan, Spain, Sweden, and Uruguay.

³ The Second Assembly proposed an amendment by which the following clause would be inserted here:

"The Assembly shall fix by a two-thirds majority the rules dealing with the election of the non-permanent Members of the Council, and particularly such regulations as relate to their term of office and the conditions of re-eligibility."

This amendment has not come into force (December 1, 1924).

sembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council, and may be decided by a majority of the Members of the League represented at the meeting.

The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

ARTICLE 6. The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary General and such secretaries and staff as may be required.

The first Secretary General shall be the person named in the Annex; thereafter the Secretary General shall be appointed by the Council with the approval of the majority of the Assembly.

The secretaries and staff of the Secretariat shall be appointed by the Secretary General with the approval of the Council.

The Secretary General shall act in that capacity at all meetings of the Assembly and of the Council.

[The expenses of the Secretariat shall be borne by the Members of the League in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union.]⁴

*The expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly.*⁵

ARTICLE 7. The Seat of the League is established at Geneva.

The Council may at any time decide that the Seat of the League shall be established elsewhere.

All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.

Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

ARTICLE 8. The Members of the League recognise that the maintenance of peace requires the reduction of national armaments to the lowest point

⁴ Now superseded.

⁵ The paragraph in italics came into force as an amendment on August 13, 1924. The Second Assembly also proposed to add the following paragraph:

"The allocation of the expenses of the League set out in Annex 3 shall be applied as from January 1, 1922, until a revised allocation has come into force after adoption by the Assembly."

The proposed Annex 3 set forth a scheme of units for allocation of expenses, and was put into a separate protocol. At the request of the Third Assembly, the Council has notified the Members of the League that it is no longer necessary to ratify these amendments. See *League of Nations Off. Jour.*, September, 1924, p. 1147.

consistent with national safety and the enforcement by common action of international obligations.

The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments.

Such plans shall be subject to reconsideration and revision at least every ten years.

After these plans shall have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.

The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes and the condition of such of their industries as are adaptable to warlike purposes.

ARTICLE 9. A permanent Commission shall be constituted to advise the Council on the execution of the provisions of Articles 1 and 8 and on military, naval and air questions generally.

ARTICLE 10. The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

ARTICLE 11. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

ARTICLE 12.⁶ The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the

⁶ The amendments indicated by italics in Articles 12, 13 and 15 came into force on September 26, 1924.

matter either to arbitration *or judicial settlement* or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators *or the judicial decision*, or the report by the Council.

In any case under this Article the award of the arbitrators *or the judicial decision* shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

ARTICLE 13.⁶ The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration *or judicial settlement*, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration *or judicial settlement*.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration *or judicial settlement*.

[For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them.]⁷

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award *or decision* that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award *or decision*, the Council shall propose what steps should be taken to give effect thereto.

ARTICLE 14. The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

ARTICLE 15.⁶ If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration *or judicial settlement* in accordance with Article 13, the Members of the

⁷ Now superseded.

League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

For this purpose the parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case, with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavor to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

ARTICLE 16.⁸ Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

⁸ The Second Assembly proposed that Article 16 be amended to read:

"Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between persons residing in their territory and persons residing in the territory of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between persons residing in the territory of the Covenant-breaking State and persons residing in the territory of any other State, whether a Member of the League or not.

"It is for the Council to give an opinion whether or not a breach of the Covenant has taken place. In deliberations on this question in the Council the votes of Members of the League alleged to have resorted to war and of Members against whom such action was directed shall not be counted.

"The Council will notify to all Members of the League the date which it recommends for the application of the economic pressure under this Article.

"Nevertheless, the Council may, in the case of particular Members, postpone the coming into force of any of these measures for a specified period where it is satisfied that such a postponement will facilitate the attainment of the object of the measures referred to in the preceding paragraph, or that it is necessary in order to minimise the loss and inconvenience which will be caused to such Members."

On September 27, 1924, the Fifth Assembly expressed the view that "it is no longer opportune for further Members of the League to ratify the said amendment" [to Article 16, paragraph 1] and recommended "in place thereof" the following:

"The latter part of the first paragraph of Article 16 of the Covenant shall read as follows: 'which hereby undertake immediately to subject it to the severance of all trade or financial relations and to prohibit all intercourse at least between persons resident within their territories and persons resident within the territory of the Covenant-breaking State and, if they deem it expedient, also between their nationals and the nationals of the Covenant-breaking State, and to prevent all financial, commercial or personal intercourse at least between persons resident within the territory of that State and persons resident within the territory of any other State, whether a Member of the League or not, and if they deem it expedient, also between the nationals of that State and the nationals of any other State whether a Member of the League or not.'"

None of the proposed amendments to Article 16 has come into force (December 1, 1924).

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

ARTICLE 17. In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

Upon such invitation being given the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

If a State so invited shall refuse to accept the obligations of Membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

If both parties to the dispute when so invited refuse to accept the obligations of Membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

ARTICLE 18. Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it.⁹ No such treaty or international engagement shall be binding until so registered.

ARTICLE 19. The Assembly may from time to time advise the reconsideration by Members of the League of Treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

ARTICLE 20. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se*

⁹ Twenty-five volumes of the League of Nations, *Treaty Series*, have now been published, containing the texts of 635 treaties or engagements which have been registered.

which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

ARTICLE 21. Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.

ARTICLE 22. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be intrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their

geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

ARTICLE 23. Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;

(b) undertake to secure just treatment of the native inhabitants of territories under their control;

(c) will intrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

(d) will intrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind;

(f) will endeavour to take steps in matters of international concern for the prevention and control of disease.

ARTICLE 24. There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League.

In all matters of international interest which are regulated by general conventions but which are not placed under the control of international bureaux or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable.

The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.

ARTICLE 25. The Members of the League agree to encourage and promote the establishment and co-operation of duly authorised voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.

ARTICLE 26.¹⁰ Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly.

No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League.

ANNEX ¹¹

I. [STATES INVITED TO BE] ORIGINAL MEMBERS OF THE LEAGUE OF NATIONS SIGNATORIES OF THE TREATY OF PEACE

United States of America	China
Belgium	Cuba
Bolivia	Ecuador
Brazil	France
British Empire	Greece
Canada	Gautemala
Australia	Haiti
South Africa	Hedjaz
New Zealand	Honduras
India	Italy

¹⁰ Article 26, as the Second Assembly has proposed that it be amended, would read:

"Amendments to the present Covenant the text of which shall have been voted by the Assembly on a three-fourths majority, in which there shall be included the votes of all the Members of the Council represented at the meeting, will take effect when ratified by the Members of the League whose Representatives composed the Council when the vote was taken and by the majority of those whose Representatives form the Assembly.

"If the required number of ratifications shall not have been obtained within twenty-two months after the vote of the Assembly, the proposed amendment shall remain without effect.

"The Secretary-General shall inform the Members of the taking effect of an amendment.

"Any Member of the League which has not at that time ratified the amendment is free to notify the Secretary-General within a year of its refusal to accept it, but in that case it shall cease to be a Member of the League."

¹¹ An addition to the Annex, dealing with "Allocation of the Expenses of the League," was proposed by the Second Assembly, but is not reprinted here.

Japan	Portugal
Liberia	Roumania
Nicaragua	Serb-Croat-Slovene State
Panama	Siam
Peru	Czecho-Slovakia
Poland	Uruguay

STATES INVITED TO ACCEDE TO THE COVENANT

Argentine Republic	Persia
Chili	Salvador
Colombia	Spain
Denmark	Sweden
Netherlands	Switzerland
Norway	Venezuela
Paraguay	

II. FIRST SECRETARY-GENERAL OF THE LEAGUE OF NATIONS

The Honourable Sir James Eric Drummond, K. C. M. G., C. B.

D

DRAFT SCHEME FOR A PERMANENT COURT OF INTERNATIONAL JUSTICE REPORTED BY THE ADVISORY COMMITTEE OF JURISTS, AUGUST 5, 1920¹

ARTICLE 1. A Permanent Court of International Justice, to which Parties shall have direct access, is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organised by the Hague Conventions of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

CHAPTER I

ORGANISATION OF THE COURT

ARTICLE 2. The Permanent Court of International Justice shall be composed of a body of independent judges elected, regardless of their nationality, from amongst persons of high moral character, who possess the qualifications required, in their respective countries, for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law.

ARTICLE 3. The Court shall consist of 15 members: 11 judges and 4 deputy-judges. The number of judges and deputy-judges may be hereafter increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of 15 judges and 6 deputy-judges.

ARTICLE 4. The members of the Court shall be elected by the Assembly and the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

ARTICLE 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration, belonging to the States mentioned in the Annex to the Covenant or to the States which shall have joined the League subsequently, inviting them to undertake, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than two persons; the nominees may be of any nationality.

ARTICLE 6. Before making these nominations, each national group is hereby recommended to consult its Highest Court of Justice, its Legal

¹ This text is taken from the *League of Nations Off. Jour.*, Special Supplement No. 2, September, 1920.

Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

ARTICLE 7. The Secretary-General of the League of Nations shall prepare a list, in alphabetical order, of all the persons thus nominated. These persons only shall be eligible for appointment, except as provided in Article 12, paragraph 2.

The Secretary-General shall submit this list to the Assembly and to the Council.

ARTICLE 8. The Assembly and the Council shall proceed to elect by independent votings, first the judges and then the deputy-judges.

ARTICLE 9. At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilisation and the principal legal systems of the world.

ARTICLE 10. Those candidates who obtain an absolute majority of votes in the Assembly and the Council shall be considered as elected.

In the event of more than one candidate of the same nationality being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

ARTICLE 11. If, after the first sitting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third sitting shall take place.

ARTICLE 12. If after the third sitting one or more seats still remain unfilled, a joint Conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Committee is unanimously agreed upon any person who fulfils the required conditions he may be included in its list, even though he was not included in the list of nominations made by the Court of Arbitration.

If the Joint Conference is not successful in procuring an election, those members of the Court who have already been appointed shall, within a time limit to be arranged by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

ARTICLE 13. The members of the Court shall be elected for nine years.

They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall complete any cases which they may have begun.

ARTICLE 14. Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member, the period of whose appointment has not expired, will hold the appointment for the remainder of his predecessor's term.

ARTICLE 15. Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court, having regard first to the order in time of each election and secondly to age.

ARTICLE 16. The exercise of any function which belongs to the political direction, national or international, of States, by the Members of the Court during their terms of office is declared incompatible with their judicial duties.

Any doubt upon this point is settled by the decision of the Court.

ARTICLE 17. No member of the Court can act as agent, counsel or advocate in any case of an international nature.

No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel, or advocate for one of the contesting parties, or as a member of a national or international Court, or of a Commission of Inquiry, or in any other capacity.

Any doubt upon this point is settled by the decision of the Court.

ARTICLE 18. A member of the Court cannot be dismissed unless, in the unanimous opinion of the other Members, he has ceased to fulfil the required conditions.

When this happens a formal notification shall be given to the Secretary-General.

This notification makes the place vacant.

ARTICLE 19. The members of the Court, when outside their own country, shall enjoy the privileges and immunities of diplomatic representatives.

ARTICLE 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

ARTICLE 21. The Court shall elect its President and Vice-President for three years: they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be considered incompatible with those of Secretary-General of the Permanent Court of Arbitration.

ARTICLE 22. The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

ARTICLE 23. A session shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th June, and shall continue for so long as may be necessary to complete the cases on the list.

The President may summon an extraordinary meeting of the Court whenever necessary.

ARTICLE 24. If, for some special reason, a member of the Court considers that he cannot take part in the decision of a particular case, he shall so inform the President.

If, for some special reason, the President considers that one of the members of the Court should not sit on a particular case, he shall give notice to the member concerned.

In the event of the President and the member not agreeing as to the course to be adopted in any such case, the matter shall be settled by the decision of the Court.

ARTICLE 25. The full Court shall sit except when it is expressly provided otherwise.

If 11 judges cannot be present, deputy-judges shall be called upon to sit in order to make up this number.

If, however, 11 judges are not available, a quorum of 9 judges shall suffice to constitute the Court.

ARTICLE 26. With a view to the speedy despatch of business the Court shall form, annually, a chamber composed of three judges, who, at the request of the contesting parties, may hear and determine cases by summary procedure.

ARTICLE 27. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

ARTICLE 28. Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates by a national group of the Court of Arbitration.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

ARTICLE 29. The judges shall receive an annual salary to be determined by the Assembly of the League of Nations upon the proposal of the Council. This salary must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

Deputy-judges shall receive a grant, for the actual performance of their duties, to be fixed in the same way.

Travelling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 28 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

A special regulation shall provide for the pensions to which the judges and Registrar shall be entitled.

ARTICLE 30. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

CHAPTER II

COMPETENCE OF THE COURT

ARTICLE 31. The Court shall have jurisdiction to hear and determine suits between States.

ARTICLE 32. The Court shall be open of right to the States mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations.

Other States may have access to it.

The conditions under which the Court shall be open of right or accessible to States which are not Members of the League of Nations shall be determined by the Council, in accordance with Article 17 of the Covenant.

ARTICLE 33. When a dispute has arisen between States, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the Court. The Court shall, first of all, decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next Article.

ARTICLE 34. Between States which are Members of the League of Nations, the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature concerning:

- (a) The interpretation of a treaty;
- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) The nature or extent of reparation to be made for the breach of an international obligation;
- (e) The interpretation of a sentence passed by the Court.

The Court shall also take cognisance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.

In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court.

ARTICLE 35. The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:

- (1) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
- (2) International custom, as evidence of a general practice, which is accepted as law;
- (3) The general principles of law recognised by civilised nations;
- (4) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

ARTICLE 36. The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.

When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

CHAPTER III

PROCEDURE

ARTICLE 37. The official language of the Court shall be French.

The Court may, at the request of the contesting parties, authorise another language to be used before it.

ARTICLE 38. A State desiring to have recourse to the Court shall lodge a written application addressed to the Registrar.

The application shall indicate the subject of the dispute, and name the contesting parties.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

ARTICLE 39. If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

ARTICLE 40. The parties shall be represented by agents.

They may have Counsel or Advocates to plead before the Court.

ARTICLE 41. The procedure shall consist of two parts: written and oral.

ARTICLE 42. The written proceedings shall consist of the communication to the judges and to the parties of statements of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

ARTICLE 43. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

ARTICLE 44. The proceedings shall be under the direction of the President, or in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

ARTICLE 45. The hearing in Court shall be public, unless the Court, at the written request of one of the parties, accompanied by a statement of his reasons, shall otherwise decide.

ARTICLE 46. Minutes shall be made at each hearing and signed by the Registrar and the President.

These minutes shall be the only authentic record.

ARTICLE 47. The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

ARTICLE 48. The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply to the Court any explanations. Any refusal shall be recorded.

ARTICLE 49. The Court may, at any time, entrust any individual, bureau, commission or other body that it may select, with the task of carrying out an inquiry or giving an expert opinion.

ARTICLE 50. During the hearing in Court, the judges may put any questions, considered by them to be necessary, to the witnesses, agents, experts, advocates or counsel. The agents, advocates and counsel shall have the right to ask, through the President, any questions that the Court considers useful.

ARTICLE 51. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other agrees.

ARTICLE 52. Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 33 and 34, but also that the claim is supported by substantial evidence and well founded in fact and law.

ARTICLE 53. When the agents, advocates and counsel, subject to the control of the Court, have presented all the evidence, and taken all other steps that they consider advisable, the President shall declare the case closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

ARTICLE 54. All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

ARTICLE 55. The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

ARTICLE 56. If the judgment given does not represent, wholly or in part, the unanimous opinion of the judges, the dissenting judges shall be entitled to have the fact of their dissent or reservations mentioned. But the reasons for their dissent or reservations shall not be expressed in the judgment.

ARTICLE 57. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

ARTICLE 58. The judgment is final and without appeal. In the event of uncertainty as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

ARTICLE 59. An application for revision of a judgment can be made only when it is based upon the discovery of some new fact, of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings in revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

No application for revision may be made after the lapse of five years from the date of the sentence.

ARTICLE 60. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

ARTICLE 61. Whenever the construction of a convention, in which States other than those concerned in the case are parties, is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be as binding upon it as upon the original parties to the dispute.

ARTICLE 62. Unless otherwise decided by the Court, each party shall bear its own costs.

E

RESOLUTION OF THE FIRST ASSEMBLY OF THE
LEAGUE OF NATIONS, DECEMBER 13, 1920¹

1. The Assembly unanimously declares its approval of the draft Statute of the Permanent Court of International Justice — as amended by the Assembly — which was prepared by the Council under Article 14 of the Covenant and submitted to the Assembly for its approval.

2. In view of the special wording of Article 14, the Statute of the Court shall be submitted within the shortest possible time to the Members of the League of Nations for adoption in the form of a Protocol duly ratified and declaring their recognition of this Statute. It shall be the duty of the Council to submit the Statute to the Members.

3. As soon as this Protocol has been ratified by the majority of the Members of the League, the Statute of the Court shall come into force and the Court shall be called upon to sit in conformity with the said Statute in all disputes between the Members or States which have ratified, as well as between the other States to which the Court is open under Article 35, paragraph 2, of the said Statute.

4. The said Protocol shall likewise remain open for signature by the States mentioned in the Annex to the Covenant.

¹ This text is taken from the *Records of the First Assembly, Plenary Meetings*, p. 500.

F

PROTOCOL OF SIGNATURE OF THE PERMANENT
COURT OF INTERNATIONAL JUSTICE, OPENED AT
GENEVA, DECEMBER 16, 1920¹

The Members of the League of Nations, through the undersigned, duly authorised, declare their acceptance of the adjoined Statute of the Permanent Court of International Justice, which was approved by a unanimous vote of the Assembly of the League on the 13th December, 1920, at Geneva.

Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The said Protocol shall remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League.

The Statute of the Court shall come into force as provided in the above-mentioned decision.

Executed at Geneva, in a single copy, the French and English texts of which shall both be authentic.

¹ This text is taken from the League of Nations, *Treaty Series*, vi, 380. The French text is also authentic.

G

STATES SIGNATORY TO THE PROTOCOL
OF SIGNATURE ¹

(December 1, 1924)

- | | |
|-------------------------------------|----------------------------------|
| 1. Albania (r) | 25. Italy (r) |
| 2. Australia (r) | 26. Japan (r) |
| 3. Austria (r) | 27. Latvia (r) |
| 4. Belgium (r) | 28. Liberia |
| 5. Bolivia | 29. Lithuania (r) |
| 6. Brazil (r) | 30. Luxemburg |
| 7. British Empire (r) | 31. Netherlands (r) |
| 8. Bulgaria (r) | 32. New Zealand (r) |
| 9. Canada (r) | 33. Norway (r) |
| 10. Chile | 34. Panama |
| 11. China (r) | 35. Paraguay |
| 12. Colombia | 36. Persia |
| 13. Costa Rica | 37. Poland (r) |
| 14. Cuba (r) | 38. Portugal (r) |
| 15. Czechoslovakia (r) | 39. Roumania (r) |
| 16. Denmark (r) | 40. Salvador |
| 17. Dominican Republic ² | 41. Serb-Croat-Slovene State (r) |
| 18. Esthonia (r) | 42. Siam (r) |
| 19. Finland (r) | 43. South Africa (Union of) (r) |
| 20. France (r) | 44. Spain (r) |
| 21. Greece (r) | 45. Sweden (r) |
| 22. Haiti (r) | 46. Switzerland (r) |
| 23. Hungary (r) ³ | 47. Uruguay (r) |
| 24. India (r) | 48. Venezuela (r) |

Signatures: 48

Ratifications: 37

(r) Indicates subsequent ratification.

¹ This list has been compiled from the *League of Nations Off. Jour.*, September, 1924, p. 1143, and the *Publications of the Court*, Series D, No. 4, pp. 16-18.

² Document C. L. 147. 1924. V.

³ Hungary's ratification is noted in *Publications of the Court*, Series D, No. 4, p. 17, but not in the *League of Nations Off. Jour.*, September, 1924.

H

OPTIONAL CLAUSE ANNEXED TO THE PROTOCOL
OF SIGNATURE OF DECEMBER 16, 1920¹

The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory, *ipso facto* and without special Convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions:²

Austria.— On behalf of the Austrian Republic, I declare that the latter recognizes, in relation to any other Member or State which accepts the same obligation, that is to say, on the condition of reciprocity, the jurisdiction of the Permanent Court as compulsory, *ipso facto* and without any special convention, for a period of five years.
March 14, 1922. (Signed) EMMERICH PFLÜGL.

Brazil.— The instrument of ratification deposited with the Permanent Secretariat of the League of Nations by the Brazilian Government contains the following passage:

" . . . we declare to recognize as compulsory, in accordance with the said resolution of the National Legislature, the jurisdiction of the said Court for the period of five years, on condition of reciprocity and as soon as it has likewise been recognized as such by two at least of the Powers permanently represented on the Council of the League of Nations."

Bulgaria.— On behalf of the Government of the Kingdom of Bulgaria, I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, unconditionally.

(Signed) POMENOV.

China.— The Chinese Government recognize as compulsory, *ipso facto* and without special convention, in relation to any Member or State which accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, par. 2, of the Statute of the Court for a period of five years.

May 13, 1922. (Signed) TS. F. TANG.

¹ This text is reprinted from the League of Nations, *Treaty Series*, vi, 384, and Document C. 607. M. 212. 1924. V.

² Arranged in alphabetical order from the League of Nations, *Treaty Series*, vi, 384-388, and compared with *Publications of the Court*, Series D, No. 4, pp. 19-23, and Document C. 607. M. 212. 1924. V. The translations of the declarations were made by the Secretariat of the League of Nations.

Costa Rica.—On condition of reciprocity.

(Signed) MANUEL M. DE PERALTA.

Denmark.—On behalf of the Danish Government and subject to ratification, I recognize, in relation to any Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto*, and without special convention, for a period of five years.

May 19, 1921.

(Signed) HERLUF ZAHLE.

Dominican Republic.³—On behalf of the Government of the Dominican Republic, and subject to ratification, I recognize, in relation to any other Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without special convention.

September 30, 1924.

(Signed) JACINTO R. DE CASTRO.

Estonia.—(Declaration contained in the instrument of ratification of the Protocol, dated May 2, 1923.)

Finland.—On behalf of the Government of the Republic of Finland, and subject to ratification, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, for a period of five years.

(Signed) ENCKELL.

France.⁴—I hereby declare that, subject to ratification, the French Government gives its adhesion to the optional clause of Article 36, paragraph 2, of the Statute of the Court, on the condition of reciprocity, for a period of 15 years, with power of denunciation, should the protocol of arbitration, security and the reduction of armaments signed this day lapse, and further subject to the observations made at the First Committee of the Fifth Assembly, according to the terms of which "one of the Parties to the dispute may bring the said dispute before the Council of the League of Nations for the purposes of the pacific settlement laid down in paragraph 3 of Article 15 of the Covenant, and during such proceedings neither Party may take proceedings against the other in the Court."

October 2, 1924.

(Signed) ARI. BRIAND.

Haiti.—On behalf of the Republic of Haiti, I recognize the jurisdiction of the Permanent Court of International Justice as compulsory.

(Signed) F. ADDOR.

Consul.

³ Document C. 607. M. 212. 1924. V.

⁴ *Ibid.*

Latvia.— On behalf of the Latvian Government, and subject to ratification by the Saeima, I declare that I recognize as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of five years, in any future dispute in respect of which the parties have not agreed to have recourse to another method of pacific settlement.
September 11, 1923. (Signed) Z. A. MEIEROVICS.

Liberia.— On behalf of the Government of the Republic of Liberia, and subject to ratification by the Liberian Senate, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention.
(Signed) B. LEHMAN.

Lithuania.— For a period of five years.
October 5, 1921. (Signed) GALVANAUSKAS.

Luxemburg.— On behalf of the Government of Luxemburg and subject to ratification, I recognize, in relation to any Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without special convention, for a period of five years.
(Signed) LEFORT.

Netherlands.— The following declaration was made by the Netherlands Chargé d'Affaires at the moment of the deposit of the deed of ratification and is contained in the Procès-Verbal of Deposit of the deed:
"On behalf of the Government of the Netherlands, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, in conformity with Article 36, par. 2, of the Statute of the Court, for a period of five years, in respect of any future dispute in regard to which the parties have not agreed to have recourse to some other means of friendly settlement."
(Signed) MOSSELMANS.

Chargé d'Affaires a. i. des Pays-Bas.

Norway.— On behalf of the Government of His Majesty the King of Norway, and subject to ratification, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto*, and without any special convention, for a period of five years.
September 6, 1921. (Signed) FRIDTJOF NANSEN.

Panama.— The following declaration was transmitted by M. R. A. Amador, Chargé d'Affaires of the Republic of Panama at Paris, in a letter dated October 25, 1921, addressed to Sir Eric Drummond, Secretary-General of the League of Nations:

"On behalf of the Government of Panama, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention."

(Signed) R. A. AMADOR,
Chargé d'Affaires.

Portugal.— On behalf of Portugal, I recognize, in relation to any Member or State accepting the same obligation, the jurisdiction of the Court as compulsory, *ipso facto* and without special convention.

(Signed) AFFONSO COSTA.

Salvador.— On condition of reciprocity.

(Signed) J. GUSTAVO GUERRERO.
ARTURO R. AVILA.

Sweden.— On behalf of the Government of His Majesty the King of Sweden, I recognize, in relation to any other Member or State which accepts the same obligation, that is to say, on the condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, for a period of five years.

Geneva, August 16, 1921. (Signed) P. DE ADLERCREUTZ.

Switzerland.— On behalf of the Swiss Government and subject to ratification by the Federal Assembly, I recognize, in relation to any Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without special convention, for a period of five years.

(Signed) MOTTA.

Uruguay.— On behalf of the Government of Uruguay, I recognize, in relation to any Member or State accepting the same obligation, that is to say, on the sole condition of reciprocity, the jurisdiction of the Court as compulsory, *ipso facto* and without special convention.

(Signed) B. FERNANDEZ Y MEDINA.

I

STATES SIGNATORY TO THE OPTIONAL CLAUSE
ANNEXED TO THE PROTOCOL OF SIGNATURE ¹

(DECEMBER 1, 1924)

1. Austria (r)	13. Liberia
2. Brazil (r)	14. Lithuania (r)
3. Bulgaria (r)	15. Luxemburg
4. China (r)	16. Netherlands (r)
5. Costa Rica	17. Norway (r)
6. Denmark (r)	18. Panama
7. Dominican Republic ²	19. Portugal (r)
8. Esthonia (r)	20. Salvador
9. Finland (r)	21. Sweden ⁴ (r)
10. France ³	22. Switzerland (r)
11. Haiti ⁴ (r)	23. Uruguay (r)
12. Latvia ⁵	

Signatures 23

Ratifications 15

(r) indicates subsequent ratification.

¹ This list has been compiled from the *League of Nations Off. Jour.*, September, 1924, p. 1144, and the *Publications of the Court*, Series D, No. 4, pp. 16-18.

² Document C. L. 147. 1924. V.

³ Document C. L. 142. 1924. V.

⁴ Special ratification of the optional clause seems to have been unnecessary because of the form of signature.

⁵ Latvia is omitted from the list in the *League of Nations Off. Jour.*, September, 1924, p. 1144. See, however, Document C. 607. M. 212. 1924. V.

J

STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, ADJOINED TO THE PROTOCOL OF SIGNATURE OF DECEMBER 16, 1920¹

ARTICLE 1. A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

CHAPTER I

ORGANISATION OF THE COURT

ARTICLE 2. The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juriscults of recognised competence in international law.

ARTICLE 3. The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges.

ARTICLE 4. The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the list of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.²

ARTICLE 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration belonging to the States men-

¹ This text is reprinted from "The Permanent Court of International Justice, Statute and Rules," published by the Institut Intermédiaire International, which is listed among the *Publications of the Court* as Series D, No. 1; it has been compared with the text published in the League of Nations, *Treaty Series*, vi, 391-411.

² For the text of Article 44 of the Hague Convention of 1907, see *ante*, p. 297.

tioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

ARTICLE 6. Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

ARTICLE 7. The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

ARTICLE 8. The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges.

ARTICLE 9. At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilisation and the principal legal systems of the world.

ARTICLE 10. Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

ARTICLE 11. If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

ARTICLE 12. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been

appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

ARTICLE 13. The members of the Court shall be elected for nine years.

They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

ARTICLE 14. Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

ARTICLE 15. Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age.

ARTICLE 16. The ordinary members of the Court may not exercise any political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the Court.

Any doubt on this point is settled by the decision of the Court.

ARTICLE 17. No member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions on the Court.

No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international Court, or of a Commission of enquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

ARTICLE 18. A member of the Court can not be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

ARTICLE 19. The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

ARTICLE 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

ARTICLE 21. The Court shall elect its President and Vice-President for three years; they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

ARTICLE 22. The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

ARTICLE 23. A session of the Court shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.

ARTICLE 24. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

ARTICLE 25. The full Court shall sit except when it is expressly provided otherwise.

If eleven judges can not be present, the number shall be made up by calling on deputy-judges to sit.

If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.

ARTICLE 26. Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portion of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to insuring a just representation of the competing interests.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labour cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will nominate, as to one half, representatives of the workers, and as to one half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace.

In Labour cases the International Labour Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

ARTICLE 27. Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications cases" composed of two persons nominated by each Member of the League of Nations.

ARTICLE 28. The special chambers provided for in Articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.

ARTICLE 29. With a view to the speedy despatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

ARTICLE 30. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

ARTICLE 31. Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this Article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

ARTICLE 32. The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

The Vice-Presidents, judges and deputy-judges shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Travelling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 31 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

ARTICLE 33. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

CHAPTER II

COMPETENCE OF THE COURT

ARTICLE 34. Only States or Members of the League of Nations can be parties in cases before the Court.

ARTICLE 35. The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be

laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court.

ARTICLE 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognise as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

- (a) The interpretation of a Treaty.
- (b) Any question of International Law.
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation.
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

ARTICLE 37. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

ARTICLE 38. The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognised by civilised nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

CHAPTER III

PROCEDURE

ARTICLE 39. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of the parties, authorise a language other than French or English to be used.

ARTICLE 40. Cases are brought before the Court, as the case may be, either by the notification of the special agreement, or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

ARTICLE 41. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

ARTICLE 42. The parties shall be represented by Agents.

They may have the assistance of Counsel or Advocates before the Court.

ARTICLE 43. The procedure shall consist of two parts: written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

ARTICLE 44. For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

ARTICLE 45. The hearing shall be under the control of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

ARTICLE 46. The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

ARTICLE 47. Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

ARTICLE 48. The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

ARTICLE 49. The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

ARTICLE 50. The Court may, at any time, entrust any individual, body, bureau, commission or other organisation that it may select, with the task of carrying out an enquiry or giving an expert opinion.

ARTICLE 51. During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

ARTICLE 52. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

ARTICLE 53. Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

ARTICLE 54. When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

ARTICLE 55. All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

ARTICLE 56. The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

ARTICLE 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

ARTICLE 58. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

ARTICLE 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

ARTICLE 60. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

ARTICLE 61. An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

ARTICLE 62. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

ARTICLE 63. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be equally binding upon it.

ARTICLE 64. Unless otherwise decided by the Court, each party shall bear its own costs.

K

RESOLUTION OF THE FIRST ASSEMBLY OF THE
LEAGUE OF NATIONS IN VIRTUE OF ARTICLE 32
OF THE STATUTE OF THE PERMANENT COURT OF
INTERNATIONAL JUSTICE, DECEMBER 18, 1920¹

The Assembly of the League of Nations, in conformity with the provisions of Article 32 of the Statute, fixes the salaries and allowances of members of the Permanent Court of International Justice as follows:²

President:

Annual salary	15,000
Special allowance	45,000
Total	60,000

Vice-President:

Annual salary	15,000
Duty allowance (200×150).	30,000 (maximum)
Total	45,000

Ordinary Judges:

Annual salary	15,000
Duty allowance (200×100).	20,000 (maximum)
Total	35,000

Deputy-Judges:

Duty allowance (200×150)	30,000 (maximum)
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Duty allowances are payable from the day of departure until the return of the beneficiary.

An additional allowance of 50 florins per day is assigned for each day of actual presence at The Hague to the Vice-President and to the ordinary and deputy-judges.

Allowances and salaries are free of all tax.

¹ Reprinted from the *Records of the First Assembly*, Plenary Meetings, p. 766. See also p. 748.

² The amounts are given in Dutch florins.

L

RULES OF COURT, ADOPTED MARCH 24, 1922¹

CHAPTER I. THE COURT

HEADING 1. CONSTITUTION OF THE COURT

SECTION A. *Judges and Assessors*

ARTICLE 1. Subject to the provisions of Article 14 of the Statute, the term of office of judges and deputy-judges shall commence on January 1st of the year following their election.

ARTICLE 2. Judges and deputy-judges elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence respectively over judges and deputy-judges elected at a subsequent session. Judges and deputy-judges elected during the same session shall take precedence according to age. Judges shall take precedence over deputy-judges.

National judges chosen from outside the Court, under the terms of Article 31 of the Statute, shall take precedence after deputy-judges in order of age.

The list of deputy-judges shall be prepared in accordance with these principles.

The Vice-President shall take his seat on the right of the President. The other Members of the Court shall take their seats to the right and left of the President in the order laid down above.

ARTICLE 3. Deputy-judges whose presence is necessary shall be summoned in the order laid down in the list referred to in the preceding Article, that is to say, each of them will be summoned in rotation throughout the list.

Should a deputy-judge be so far from the seat of the Court that, in the opinion of the President, a summons would not reach him in sufficient time, the deputy-judge next on the list shall be summoned; nevertheless, the judge to whom the summons should have been addressed shall be called upon, if possible, on the next occasion that the presence of a deputy-judge is required.

A deputy-judge who has begun a case shall be summoned again, if necessary out of his turn, in order to continue to sit in the case until it is finished.

Should a deputy-judge be summoned to take his seat in a particular case as a national judge, under the terms of Article 31 of the Statute, such summons shall not be regarded as coming within the terms of the present Article.

¹ This text is taken from "The Permanent Court of International Justice, Statute and Rules," published by the Institut Intermédiaire International (1922), pp. 73-114. (This volume is listed as Series D, No. 1, of the *Publications of the Court*.)

The French text is also authentic.

ARTICLE 4. In cases in which one or more parties are entitled to choose a judge *ad hoc* of their nationality, the full Court may sit with a number of judges exceeding eleven.

When the Court has satisfied itself, in accordance with Article 31 of the Statute, that there are several parties in the same interest and that none of them has a judge of its nationality upon the bench, the Court shall invite them, within a period to be fixed by the Court, to select by common agreement a deputy-judge of the nationality of one of the parties, should there be one; or, should there not be one, a judge chosen in accordance with the principles of the above-mentioned Article.

Should the parties have failed to notify the Court of their selection or choice when the time limit expires, they shall be regarded as having renounced the right conferred upon them by Article 31.

ARTICLE 5. Before entering upon his duties, each member of the Court or judge summoned to complete the Court, under the terms of Article 31 of the Statute, shall make the following solemn declaration in accordance with Article 20 of the Statute:

"I solemnly declare that I will exercise all my powers and duties as a judge honourably and faithfully, impartially and conscientiously."

A special public sitting of the Court may, if necessary, be convened for this purpose.

At the public inaugural sitting held after a new election of the whole Court the required declaration shall be made first by the President, secondly by the Vice-President, and then by the remaining judges in the order laid down in Article 2.

ARTICLE 6. For the purpose of applying Article 18 of the Statute, the President or if necessary the Vice-President, shall convene the judges and deputy-judges. The member affected shall be allowed to furnish explanations. When he has done so the question shall be discussed and a vote shall be taken, the member in question not being present. If the members present are unanimously agreed, the Registrar shall issue the notification prescribed in the above-mentioned Article.

ARTICLE 7. The President shall take steps to obtain all information which might be helpful to the Court in selecting technical assessors in each case. With regard to the questions referred to in Article 26 of the Statute, he shall, in particular, consult the Governing Body of the International Labour Office.

The assessors shall be appointed by an absolute majority of votes, either by the Court or by the special Chamber which has to deal with the case in question.

ARTICLE 8. Assessors shall make the following solemn declaration at the first sitting of the Court at which they are present:

"I solemnly declare that I will exercise my duties and powers as an assessor honourably and faithfully, impartially and conscientiously, and that I will scrupulously observe all the provisions of the Statute and of the Rules of Court."

SECTION B. *The Presidency*

ARTICLE 9. The election of the President and Vice-President shall take place at the end of the ordinary session immediately before the normal termination of the period of office of the retiring President and Vice-President.

After a new election of the whole Court, the election of the President and Vice-President shall take place at the commencement of the following session. The President and Vice-President elected in these circumstances shall take up their duties on the day of their election. They shall remain in office until the end of the second year after the year of their election.

Should the President or the Vice-President cease to belong to the Court before the expiration of their normal term of office, an election shall be held for the purpose of appointing a substitute for the unexpired portion of their term of office. If necessary, an extraordinary session of the Court may be convened for this purpose.

The elections referred to in the present Article shall take place by secret ballot. The candidate obtaining an absolute majority of votes shall be declared elected.

ARTICLE 10. The President shall direct the work and administration of the Court; he shall preside at the meetings of the full Court.

ARTICLE 11. The Vice-President shall take the place of the President, should the latter be unable to be present, or, should he cease to hold office, until the new President has been appointed by the Court.

ARTICLE 12. The President shall reside within a radius of ten kilometres from the Peace Palace at The Hague.

The main annual vacation of the President shall not exceed three months.

ARTICLE 13. After a new election of the whole Court and until such time as the President and Vice-President have been elected, the judge who takes precedence according to the order laid down in Article 2, shall perform the duties of President.

The same principle shall be applied should both the President and the Vice-President be unable to be present, or should both appointments be vacant at the same time.

SECTION C. *The Chambers*

ARTICLE 14. The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute shall be appointed at a meeting of the full Court by an absolute majority of votes, regard being had for the purposes of this selection to any preference expressed by the judges, so far as the provisions of Article 9 of the Statute permit.

The substitutes mentioned in Articles 26 and 27 of the Statute shall be appointed in the same manner. Two judges shall also be chosen to replace any member of the Chamber for summary procedure who may be unable to sit.

The election shall take place at the end of the ordinary session of the Court, and the period of appointment of the members elected shall commence on January 1st of the following year.

Nevertheless, after a new election of the whole Court the election shall take place at the beginning of the following session. The period of appointment shall commence on the date of election and shall terminate, in the case of the Chamber referred to in Article 29 of the Statute, at the end of the same year and, in the case of the Chambers referred to in Articles 26 and 27 of the Statute, at the end of the second year after the year of election.

The Presidents of the Chambers shall be appointed at a sitting of the full Court. Nevertheless, the President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member; similarly, the Vice-President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member, provided that the President is not also a member.

ARTICLE 15. The special Chambers for labour cases and for communications and transit cases may not sit with a greater number than five judges.

Except as provided in the second paragraph of the preceding Article, the composition of the Chamber for summary procedure may not be altered.

ARTICLE 16. Deputy-judges shall not be summoned to complete the special Chambers or the Chamber for summary procedure, unless sufficient judges are not available to complete the number required.

SECTION D. *The Registry*

ARTICLE 17. The Court shall select its Registrar from amongst candidates proposed by members of the Court.

The election shall be by secret ballot and by a majority of votes. In the event of an equality of votes, the President shall have a casting vote.

The Registrar shall be elected for a term of seven years commencing on January 1st of the year following that in which the election takes place. He may be re-elected.

Should the Registrar cease to hold his office before the expiration of the term above-mentioned, an election shall be held for the purpose of appointing a successor.

ARTICLE 18. Before taking up his duties, the Registrar shall make the following declaration at a meeting of the full Court:

"I solemnly declare that I will perform the duties conferred upon me as Registrar of the Permanent Court of International Justice in all loyalty, discretion and good conscience."

The other members of the Registry shall make a similar declaration before the President, the Registrar being present.

ARTICLE 19. The Registrar shall reside within a radius of ten kilometres from the Peace Palace at The Hague.

The main annual vacation of the Registrar shall not exceed two months.

ARTICLE 20. The staff of the Registry shall be appointed by the Court on proposals submitted by the Registrar.

ARTICLE 21. The Regulations for the Staff of the Registry shall be adopted by the President on the proposal of the Registrar, subject to subsequent approval by the Court.

ARTICLE 22. The Court shall determine or modify the organisation of the Registry upon proposals submitted by the Registrar. On the proposal of the Registrar, the President shall appoint the member of the Registry who is to act for the Registrar in his absence or, in the event of his ceasing to hold his office, until a successor has been appointed.

ARTICLE 23. The registers kept in the archives shall be so arranged as to give particulars with regard to the following points amongst others:

1. for each case or question, all documents pertaining to it and all action taken with regard to it in chronological order; all such documents shall bear the same file number and shall be numbered consecutively within the file;

2. all decisions of the Court in chronological order, with references to the respective files;

3. all advisory opinions given by the Court in chronological order, with references to the respective files;

4. all notifications and similar communications sent out by the Court, with references to the respective files.

Indexes kept in the archives shall comprise:

1. a card index of names with necessary references;

2. a card index of subject matter with like references.

ARTICLE 24. During hours to be fixed by the President the Registrar shall receive any documents and reply to any enquiries, subject to the provisions of Article 38 of the present Rules and to the observance of professional secrecy.

ARTICLE 25. The Registrar shall be the channel for all communications to and from the Court.

The Registrar shall ensure that the date of despatch and receipt of all communications and notifications may readily be verified. Communications and notifications sent by post shall be registered. Communications addressed to the official representatives or to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a receipt bearing this date and the number under which the document has been registered shall be given to the sender, if a request to that effect be made.

ARTICLE 26. The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. He shall himself be present at all meetings of the full Court and either he, or a person appointed to represent him with

the approval of the Court, shall be present at all sittings of the various Chambers; he shall be responsible for drawing up the minutes of the meetings.

He shall further undertake all duties which may be laid upon him by the present Rules.

The duties of the Registry shall be set forth in detail in a List of Instructions to be submitted by the Registrar to the President for his approval.

HEADING 2. WORKING OF THE COURT

ARTICLE 27. In the year following a new election of the whole Court the ordinary annual session shall commence on the fifteenth of January.

If the day fixed for the opening of a session is regarded as a holiday at the place where the Court is sitting, the session shall be opened on the working day following.

ARTICLE 28. The list of cases shall be prepared and kept up to date by the Registrar under the responsibility of the President. The list for each session shall contain all questions submitted to the Court for an advisory opinion and all cases in regard to which the written proceedings are concluded, in the order in which the documents submitting each question or case have been received by the Registrar. If in the course of a session, a question is submitted to the Court or the written proceedings in regard to any case are concluded, the Court shall decide whether such question or case shall be added to the list for that session.

The Registrar shall prepare and keep up to date extracts from the above list showing the cases to be dealt with by the respective Chambers.

The Registrar shall also prepare and keep a list of cases for revision.

ARTICLE 29. During the sessions the dates and hours of sittings shall be fixed by the President.

ARTICLE 30. If at any sitting of the full Court it is impossible to obtain the prescribed quorum, the Court shall adjourn until the quorum is obtained.

ARTICLE 31. The Court shall sit in private to deliberate upon the decision of any case or on the reply to any question submitted to it.

During the deliberation referred to in the preceding paragraph, only persons authorised to take part in the deliberation and the Registrar shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court, having regard to exceptional circumstances.

Every member of the Court who is present at the deliberation shall state his opinion together with the reasons on which it is based.

The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the members.

Any member of the Court may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. A request to this effect shall be complied with.

CHAPTER II. PROCEDURE

HEADING 1. CONTENTIOUS PROCEDURE

SECTION A. *General Provisions*

ARTICLE 32. The rules contained under this heading shall in no way preclude the adoption by the Court of such other rules as may be jointly proposed by the parties concerned, due regard being paid to the particular circumstances of each case.

ARTICLE 33. The Court shall fix time limits in each case by assigning a definite date for the completion of the various acts of procedure, having regard as far as possible to any agreement between the parties.

The Court may extend time limits which it has fixed. It may likewise decide in certain circumstances that any proceeding taken after the expiration of a time limit shall be considered as valid.

If the Court is not sitting the powers conferred upon it by this Article shall be exercised by the President, subject to any subsequent decision of the Court.

ARTICLE 34. All documents of the written proceedings submitted to the Court shall be accompanied by not less than thirty printed copies certified correct. The President may order additional copies to be supplied.

SECTION B. *Procedure before the Court and before the Special Chambers*
(Articles 26 and 27 of the Statute)I. *Institution of Proceedings*

ARTICLE 35. When a case is brought before the Court by means of a special agreement, the latter, or the document notifying the Court of the agreement, shall mention the addresses selected at the seat of the Court to which notices and communications intended for the respective parties are to be sent.

In all other cases in which the Court has jurisdiction, the application shall include, in addition to an indication of the subject of the dispute and the names of the parties concerned, a succinct statement of facts, an indication of the claim and the address selected at the seat of the Court to which notices and communications are to be sent.

Should proceedings be instituted by means of an application, the first document sent in reply thereto shall mention the address selected at the seat of the Court to which subsequent notices and communications in regard to the case are to be sent.

Should the notice of a special agreement, or the application, contain a request that the case be referred to one of the special Chambers mentioned in Articles 26 or 27 of the Statute, such request shall be complied with, provided that the parties are in agreement.

Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27 of the Statute, or that the case be referred to the Chamber for summary procedure shall also be granted;

compliance with the latter request is, however, subject to the condition that the case does not refer to any of the questions indicated in Articles 26 and 27 of the Statute.

ARTICLE 36. The Registrar shall forthwith communicate to all members of the Court special agreements or applications which have been notified to him.

II. Written Proceedings

ARTICLE 37. Should the parties agree that the proceedings shall be conducted in French or in English, the documents constituting the written procedure shall be submitted only in the language adopted by the parties.

In the absence of an agreement with regard to the language to be employed, documents shall be submitted in French or in English.

Should the use of a language other than French or English be authorised, a translation into French or into English shall be attached to the original of each document submitted.

The Registrar shall not be bound to make translations of documents submitted in accordance with the above rules.

In the case of voluminous documents the Court, or the President, if the Court is not sitting, may, at the request of the party concerned, sanction the submission of translations of portions of documents only.

ARTICLE 38. The Court, or the President, if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the cases and counter-cases of each suit at the disposal of the Government of any State which is entitled to appear before the Court.

ARTICLE 39. In cases in which proceedings have been instituted by means of a special agreement, the following documents may be presented in the order stated below, provided that no agreement to the contrary has been concluded between the parties:

- a case, submitted by each party within the same limit of time;
- a counter-case, submitted by each party within the same limit of time;
- a reply, submitted by each party within the same limit of time.

When proceedings are instituted by means of an application, failing any agreement to the contrary between the parties, the documents shall be presented in the order stated below:

- the case by the applicant;
- the counter-case by the respondent;
- the reply by the applicant;
- the rejoinder by the respondent.

ARTICLE 40. Cases shall contain:

1. a statement of the facts on which the claim is based;
2. a statement of law;
3. a statement of conclusions;
4. a list of the document in support; these documents shall be attached to the case.

Counter-cases shall contain:

1. the affirmation or contestation of the facts stated in the case;
2. a statement of additional facts, if any;
3. a statement of law;
4. conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court;
5. a list of the document in support; these documents shall be attached to the counter-case.

ARTICLE 41. Upon the termination of the written proceedings the President shall fix a date for the commencement of the oral proceedings.

ARTICLE 42. The Registrar shall forward to each of the members of the Court, a copy of all documents in the case as he receives them.

III. Oral Proceedings

ARTICLE 43. In the case of a public sitting, the Registrar shall publish in the Press all necessary information as to the date and hour fixed.

ARTICLE 44. The Registrar shall arrange for the interpretation from French into English and from English into French of all statements, questions and answers which the Court may direct to be so interpreted.

Whenever a language other than French or English is employed, either under the terms of the third paragraph of Article 39 of the Statute or in a particular instance, the necessary arrangements for translation into one of the two official languages shall be made by the party concerned. In the case of witnesses or experts who appear at the instance of the Court, these arrangements shall be made by the Registrar.

ARTICLE 45. The Court shall determine in each case whether the representatives of the parties shall address the Court before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.

ARTICLE 46. The order in which the agents, advocates or counsel, shall be called upon to speak shall be determined by the Court, failing an agreement between the parties on the subject.

ARTICLE 47. In sufficient time before the opening of the oral proceedings, each party shall inform the Court and the other parties of all evidence which it intends to produce, together with the names, Christian names, description and residence of witnesses whom it desires to be heard.

It shall further give a general indication of the point or points to which the evidence is to refer.

ARTICLE 48. The Court may, subject to the provisions of Article 44 of the Statute, invite the parties to call witnesses, or may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement.

ARTICLE 49. The Court, or the President, should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses out of Court.

ARTICLE 50. Each witness shall make the following solemn declaration before giving his evidence in Court:

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."

ARTICLE 51. Witnesses shall be examined by the representatives of the parties under the control of the President. Questions may be put to them by the President and afterwards by the judges.

ARTICLE 52. The indemnities of witnesses who appear at the instance of the Court shall be paid out of the funds of the Court.

ARTICLE 53. Any report or record of an enquiry carried out at the request of the Court, under the terms of Article 50 of the Statute, and reports furnished to the Court by experts, in accordance with the same Article, shall be forthwith communicated to the parties.

ARTICLE 54. A record shall be made of the evidence taken. The portion containing the evidence of each witness shall be read over to him and approved by him.

As regards the remainder of the oral proceedings, the Court shall decide in each case whether verbatim records of all or certain portions of them shall be prepared for its own use.

ARTICLE 55. The minutes mentioned in Article 47 of the Statute shall in particular include:

1. the names of the judges;
2. the names of the agents, advocates and counsel;
3. the names, Christian names, description and residence of witnesses heard;
4. a specification of other evidence produced;
5. any declarations made by the parties;
6. all decisions taken by the Court during the hearing.

ARTICLE 56. Before the oral proceedings are concluded each party may present his bill of costs.

IV. Interim Protection

ARTICLE 57. When the Court is not sitting, any measures for the preservation in the meantime of the respective rights of the parties shall be indicated by the President.

Any refusal by the parties to conform to the suggestions of the Court or of the President, with regard to such measures, shall be placed on record.

V. Intervention

ARTICLE 58. An application for permission to intervene, under the terms of Article 62 of the Statute, must be communicated to the Registrar at latest before the commencement of the oral proceedings.

Nevertheless the Court may, in exceptional circumstances, consider an application submitted at a later stage.

ARTICLE 59. The application referred to in the preceding Article shall contain:

1. a specification of the case in which the applicant desires to intervene;
2. a statement of law and of fact justifying intervention;
3. a list of the documents in support of the application; these documents shall be attached.

Such application shall be immediately communicated to the parties, who shall send to the Registrar any observations which they may desire to make within a period to be fixed by the Court, or by the President, should the Court not be sitting.

ARTICLE 60. Any State desiring to intervene, under the terms of Article 63 of the Statute, shall inform the Registrar in writing at latest before the commencement of the oral proceedings.

The Court, or the President, if the Court is not sitting, shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court.

VI. Agreement

ARTICLE 61. If the parties conclude an agreement regarding the settlement of the dispute and give written notice of such agreement to the Court before the close of the proceedings, the Court shall officially record the conclusion of the agreement.

Should the parties by mutual agreement notify the Court in writing that they intend to break off proceedings, the Court shall officially record the fact and proceedings shall be terminated.

VII. Judgment

ARTICLE 62. The judgment shall contain:

1. the date on which it is pronounced;
2. the names of the judges participating;
3. the names and style of the parties;
4. the names of the agents of the parties;
5. the conclusions of the parties;
6. the matters of fact;
7. the reasons in point of law;
8. the operative provisions of the judgment;
9. the decision, if any, referred to in Article 64 of the Statute.

The opinions of judges who dissent from the judgment, shall be attached thereto should they express a desire to that effect.

ARTICLE 63. After having been read in open Court the text of the judgment shall forthwith be communicated to all parties concerned and to the Secretary-General of the League of Nations.

ARTICLE 64. The judgment shall be regarded as taking effect on the day on which it is read in open Court, in accordance with Article 58 of the Statute.

ARTICLE 65. A collection of the judgments of the Court shall be printed and published under the responsibility of the Registrar.

VIII. Revision

ARTICLE 66. Application for revision shall be made in the same form as the application mentioned in Article 40 of the Statute.

It shall contain:

1. the reference to the judgment impeached;
2. the fact on which the application is based;
3. a list of the documents in support; these documents shall be attached.

It shall be the duty of the registrar to give immediate notice of an application for revision to the other parties concerned. The latter may submit observations within a time limit to be fixed by the Court, or by the President should the Court not be sitting.

If the judgment impeached was pronounced by the full Court, the application for revision shall also be dealt with by the full Court. If the judgment impeached was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute, the application for revision shall be dealt with by the same Chamber. The provisions of Article 13 of the Statute shall apply in all cases.

If the Court, under the third paragraph of Article 61 of the Statute, makes a special order rendering the admission of the application conditional upon previous compliance with the terms of the judgment impeached, this condition shall be immediately communicated to the applicant by the Registrar, and proceedings in revision shall be stayed pending receipt by the Registrar of proof of previous compliance with the original judgment and until such proof shall have been accepted by the Court.

SECTION C. Summary Procedure

ARTICLE 67. Except as provided under the present section the rules for procedure before the full Court shall apply to summary procedure.

ARTICLE 68. Upon receipt by the Registrar of the document instituting proceedings in a case which, by virtue of an agreement between the parties, is to be dealt with by summary procedure, the President shall convene as soon as possible the Chamber referred to in Article 29 of the Statute.

ARTICLE 69. The proceedings are opened by the presentation of a case by each party. These cases shall be communicated by the Registrar to the members of the Chamber and to the opposing party.

The cases shall contain reference to all evidence which the parties may desire to produce.

Should the Chamber consider that the cases do not furnish adequate information, it may, in the absence of an agreement to the contrary between the parties, institute oral proceedings. It shall fix a date for the commencement of the oral proceedings.

At the hearing, the Chamber shall call upon the parties to supply oral explanations. It may sanction the production of any evidence mentioned in the cases.

If it is desired that witnesses or experts whose names are mentioned in the case should be heard, such witnesses or experts must be available to appear before the Chamber when required.

ARTICLE 70. The judgment is the judgment of the Court rendered in the Chamber of summary procedure. It shall be read at a public sitting of the Chamber.

HEADING 2. ADVISORY PROCEDURE

ARTICLE 71. Advisory opinions shall be given after deliberation by the full Court.

The opinions of dissenting judges may, at their request, be attached to the opinion of the Court.

ARTICLE 72. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

ARTICLE 73. The Registrar shall forthwith give notice of the request for an advisory opinion to the members of the Court, and to the Members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant.

Notice of such request shall also be given to any international organisations which are likely to be able to furnish information on the question.

ARTICLE 74. Any advisory opinion which may be given by the Court and the request in response to which it was given shall be printed and published in a special collection for which the Registrar shall be responsible.

HEADING 3. ERRORS

ARTICLE 75. The Court, or the President if the Court is not sitting, shall be entitled to correct an error in any order, judgment or opinion, arising from a slip or accidental omission.

M

RESOLUTION OF THE COUNCIL OF THE LEAGUE OF NATIONS IN VIRTUE OF ARTICLE 35, PARAGRAPH 2, OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, MAY 17, 1922.¹

The Council of the League of Nations,

In virtue of the powers conferred upon it by Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice, and subject to the provisions of that article,

Resolves:

1. That the Permanent Court of International Justice shall be open to a State which is not a Member of the League of Nations nor mentioned in the Annex to the Covenant of the League, upon the following condition, namely: that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Covenant of the League of Nations and with the terms and subject to the conditions of the Statute and Rules of Procedure of the Court, and undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

2. That such declaration may be either particular or general.

A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen.

A general declaration is one accepting the jurisdiction generally in respect of all disputes, or of a particular class or classes of disputes which have already arisen or which may arise in the future.

A State, in making such a general declaration, may accept the jurisdiction of the Court as compulsory *ipso facto* and without special convention in conformity with Article 36 of the Statute of the Court; but such acceptance may not, without special convention, be relied upon *vis-à-vis* Members of the League of Nations or States mentioned in the Annex to the Covenant which have signed or may hereafter sign the "optional clause" provided for by the additional protocol of December 16th, 1920.

3. The original declarations made under the terms of this resolution shall be kept in the custody of the Registrar of the Court. Certified true copies thereof shall be transmitted, in accordance with the practice of the Court, to all Members of the League of Nations and States mentioned in the Annex to the Covenant, and to such other States as the Court may determine, and to the Secretary-General of the League of Nations.

¹ *League of Nations Off. Jour.*, iii, 545-546.

4. The Council of the League of Nations reserves the right to rescind or amend this resolution by a resolution which shall be communicated to the Court; and on the receipt of such communication by the Registrar of the Court, and to the extent determined by the new resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court.

5. All questions as to the validity or the effect of a declaration made under the terms of this resolution shall be decided by the Court.

N

MEMBERS OF THE PERMANENT COURT OF
INTERNATIONAL JUSTICE ¹

I. JUDGES. (Terms Expire December 31, 1930.)

1. Altamira y Crevea, Rafael. (Spain.)

Born 1866. Professor of the History of Political and Civil Institutions of America at the University of Madrid; Member of the Advisory Committee of Jurists set up by the Council to draft the Statute of the Permanent Court of International Justice; President of the Iberian-American Institute of Comparative Law.

2. Anzilotti, Dionisio. (Italy.)

Born 1869. Professor of International Law at the University of Rome; formerly Jurisconsult of the Ministry of Foreign Affairs; Member of the Permanent Court of Arbitration since 1916; formerly Under-Secretary General of the League of Nations; founder and editor of the *Rivista di Diritto Internazionale*.

3. Barbosa, Ruy. (Brazil.)

Born 1849, died 1923. Formerly Minister of Finance of Brazil; formerly Vice-President; Delegate to the Second Peace Conference at The Hague, 1907.

[Succeeded by Judge Pessoa.]

4. Bustamante y Sirven, Antonio Sánchez de. (Cuba.)

Born 1865. Professor of International Law at the University of Havana; President of the Cuban Society of International Law; Delegate to the Second Peace Conference at The Hague, 1907; Member of the Permanent Court of Arbitration since 1908; Delegate to the Peace Conference, 1919; Director of the *Revista de Derecho Internacional*.

5. Finlay, Robert Bannatyne (Viscount). (Great Britain.)

Born 1842. Formerly Solicitor-General and Attorney-General of Great Britain; formerly Lord Chancellor; Member of the Permanent Court of Arbitration since 1920.

¹ This information has been taken for the most part from official documents, but it may contain slight inaccuracies as to titles. See Document A. 30. 1921. V; Document A. 37. 1923. V; John Bassett Moore, in *Columbia Law Review*, xxii, 502-504; *Headway* for November, 1921, p. 33.

The technical assessors provided for in Articles 26 and 27 of the Court's Statute are very numerous, and are not listed here for this reason. On November 1, 1924, there were 106 assessors for Labor cases and 49 assessors for Transit and Communications cases. Such assessors are not members of the Court.

6. Huber, Hans Max. (Switzerland.)
Born 1874. Honorary Professor of Public Law at the University of Zurich; Delegate of the Swiss Confederation at the Second Peace Conference at The Hague in 1907; member of the Permanent Court of Arbitration since 1922.
7. Loder, Bernard Cornelis Johannes. (Netherlands.)
Born 1849. Member of the Supreme Court of the Netherlands; Member of the Advisory Committee of Jurists appointed by the Council to draft the Statute of the Permanent Court of International Justice.
8. Moore, John Bassett. (United States of America.)
Born 1860. Formerly Professor of International Law at Columbia University; formerly Assistant Secretary of State and Counselor of the Department of State; Member of the Permanent Court of Arbitration since 1912.
9. Nyholm, Didrik Galtrup Gjedde. (Denmark.)
Born 1858. Formerly President of the Mixed Court of Cairo; formerly Judge *hors cadre* of the Court of Appeal at Copenhagen; Member of the Permanent Court of Arbitration since 1913.
10. Oda, Yorozu. (Japan.)
Born 1868. Professor of International Law at the University of Kyoto; Member of the Permanent Court of Arbitration since 1921.
11. Pessôa, Epitacio da Silva. (Brazil.)
Born 1865. Formerly President of the Republic of Brazil; Delegate at the Peace Conference, 1919; formerly judge of the Federal Tribunal of Brazil.
[Elected in 1923 to succeed Judge Barbosa.]
12. Weiss, Charles André. (France.)
Born 1858. Professor of Public and Private International Law at the University of Paris; formerly Jurisconsult of the Ministry of Foreign Affairs; Member of the Permanent Court of Arbitration since 1920.

II. DEPUTY-JUDGES. (Terms Expire December 31, 1930.)

1. Beichmann, Frederik Valdemar Nikolai. (Norway.)
Born 1859. President of the Court of Appeal at Trondhjém; Member of the Permanent Court of Arbitration since 1921.
2. Negulesco, Demitri. (Roumania.)
Born 1876. Professor of Law at the University of Bucharest; formerly Judge in the Roumanian Courts; Delegate to the First Assembly of the League of Nations, 1920, and to the Second Assembly, 1921.

3. Wang-Chung-Hui. (China.)

Born 1882. President of the Supreme Court of China; Minister of Foreign Affairs of the Provisional Government of Nanking; President of the Commission on Codification of the Laws of China; formerly Minister of Justice; Delegate to the Washington Conference on Limitation of Armaments, 1921.

4. Yovanovitch, Michel. (Serb-Croat-Slovene State.)

Born 1853. Formerly Minister of Justice; formerly President of the Supreme Court at Belgrade; Member of the Permanent Court of Arbitration since 1920.

REGISTRAR (Term Expires January 31, 1929.)

Hammar skjöld, Åke. (Sweden.)

Formerly Secretary of Legation in the Swedish Diplomatic Service; formerly Member of the Secretariat of the League of Nations.

O

JUDGMENTS AND OPINIONS OF THE COURT

(December 1, 1924)

JUDGMENTS

1. The Wimbledon Case (Kiel Canal).
Judgment given August 17, 1923.
2. The Mavrommatis Palestine Concessions.
Judgment given August 30, 1924.
3. The Treaty of Neuilly, Part IX, Section IV, Annex, Paragraph 4 (Interpretation).
Judgment given September 12, 1924.

ADVISORY OPINIONS

1. With regard to the nomination of the Workers' Delegate of the Netherlands to the International Labour Conference.
Opinion given July 31, 1922.
2. With regard to whether the competence of the International Labour Organization extends to conditions of labour of persons employed in Agriculture.
Opinion given August 12, 1922.
3. With regard to whether examination of proposals for the organization and development of methods of agricultural production falls within the competence of the International Labour Organization.
Opinion given August 12, 1922.
4. With regard to the Nationality Decrees issued in Tunis and Morocco (French Zone) on November 8, 1921. Opinion given February 7, 1923.
5. With regard to the Status of Eastern Carelia.
Opinion given July 23, 1923.
6. With regard to certain questions relating to settlers of German origin in the territory ceded by Germany to Poland.
Opinion given September 10, 1923.
7. With regard to certain questions arising out of the application of Article 4 of the Polish Minorities Treaty.
Opinion given September 15, 1923.
8. With regard to a question concerning the delimitation of the Polish-Czechoslovak frontiers. (Commonly called the Jaworzina question.)
Opinion given December 6, 1923.
9. With regard to the question of the monastery of Saint-Naoum (Albanian Frontier).
Opinion given September 4, 1924.

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The Permanent Court of International Justice. Explanatory statement by Å. Hammarskjöld, Registrar of the Court. Geneva, 1921. 20 p.

The Permanent Court of International Justice. Information Section, League of Nations Secretariat. Geneva, 1923. 37 p.

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2. August 30, 1924. *The Mavrommatis Palestine Concessions*. 93 p.
3. September 12, 1924. *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation)*. 10 p.

SERIES B. COLLECTION OF ADVISORY OPINIONS

1. July 31, 1922. *Nomination of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*. 27 p.
- 2 and 3. August 12, 1922. *Competence of the International Labour Organisation in regard to (1) international regulation of the conditions of labour of persons employed in agriculture; and (2) the examination of proposals for the organisation and development of the methods of agricultural production and other questions of like character*. 61 p.
4. February 7, 1923. *Nationality decrees issued in Tunis and Morocco (French zone) on November 8, 1921*. [v], 32 p.
5. July 23, 1923. *Status of Eastern Carelia*. [v], 29 p.
6. September 10, 1923. *German settlers in Poland*. [v], 43 p.
7. September 15, 1923. *Acquisition of Polish nationality*. [v], 26 p.

¹ These publications may be obtained through the World Peace Foundation, 40 Mt. Vernon St., Boston, Massachusetts, U. S. A.

8. December 6, 1923. Question of Jaworzina (Polish-Czechoslovakian Frontier). [v], 57 p.

9. September 4, 1924. Question of the Monastery of Saint-Naoum (Albanian Frontier). [v], 27 p.

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ADVISORY OPINIONS GIVEN BY THE COURT

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3. Third session (June 15th-September 15th, 1923). Documents relating to Advisory Opinions Nos. 5, 6, and 7, and Judgment No. 1.

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